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No. _____

(CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
(Capital Case)

1. Is a defense counsel's decision not to interview or call two witnesses to testify ineffective assistance under the Sixth and Fourteenth Amendments even though (1) the first witness's testimony would be inadmissible under a state rule of evidence (identical to a South Carolina rule whose constitutionality is before this Court in *Holmes v. South Carolina*, 126 S.Ct. 34 (2005)), and (2) interviewing the second witness would not have yielded new information?

2. Is a state procedural rule an inadequate bar to federal habeas review solely because the remedy provided by a retroactive application of a judge-created exception to the procedural rule is deemed inadequate, even though the exception did not exist at the time of the initial application of the procedural rule, state precedent prohibited a broader remedy, and the adequacy of the procedural rule itself is not in dispute?

PARTIES TO THE PROCEEDING

Petitioner, Donald P. Roper, is the Superintendent of the Potosi Correctional Center, Missouri, where Respondent Leamon White is confined.

Respondent White is a prisoner in state custody pursuant to his conviction for first degree murder for which the jury sentenced him to death. He was the petitioner in a federal habeas corpus proceeding brought in the United States District Court for the Western District of Missouri.

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No. _____

IN THE
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DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
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v.

LEAMON WHITE,
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On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

Petitioner, by and through the Attorney General of Missouri, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinions of the U.S. Court of Appeals for the Eighth Circuit are reported at 206 F.3d 776, 307 F.3d 722, and 416 F.3d 728. App. 1, 63, 109. The June 14, 2004, order of the U.S. District Court for the Western District of Missouri is unreported. App. 8.

JURISDICTION

The Court of Appeals entered its judgment on August 2, 2005. App.1. The Court of Appeals denied the petition for rehearing and rehearing en banc on September 9, 2005. App. 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. Petitioner previously sought certiorari review of the Court of Appeals' opinion of March 14, 2000. See *Luebbers v. White*, 531 U.S. 917 (mem. Oct. 2, 2000). Because that judgment was not final, this Court has jurisdiction to grant certiorari on the second question presented here, which is similar to the question presented in the previous certiorari petition. "Supreme Court review of a final judgment opens up the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals or district court. The Court can reach back and correct errors in the interlocutory proceedings below, even though no attempt was made at the time to secure review of the interlocutory decree or even though such an attempt was made without success." Robert L. Stern, et al., SUPREME COURT PRACTICE §2.2 (8th ed. 2002) (collecting cases).

CONSTITUTIONAL & STATUTORY PROVISIONS

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides: "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law[.]"

Subsection (a) of 28 U.S.C. § 2254 provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

In the early morning hours of January 6, 1987, Respondent Leamon White, along with Roger Buckner and Cleveland Ford, went to Donald Wright's house to buy crack cocaine. App. 9-10. Wright, his girlfriend Carol Kinney, and Ernest Black were at the house. App. 9-10. White and his companions brandished guns and demanded to know the location of the drugs and money. App. 9-10. White put his gun to Wright's head. App. 9-10. Wright said the drugs and money were not in the house. App. 9-10. White and his companions tied up Wright, Kinney, and Black in the front rooms and Kinney's two children, Deonta and Raymond Kinney (ages eight and seven, respectively), in a back bedroom. App. 9-10, 317-19. White repeatedly pistol-whipped Wright, all the while unsuccessfully interrogating him, and had either Buckner or Ford choke Wright. App. 9-10. White then declared that Wright, Kinney, and Black must die. App. 9, 12. White slit Wright's throat; his companions slit Kinney and Black's throats. App. 9-10. After turning on a gas stove and extinguishing its pilot lights, White, Buckner, and Ford left. App. 10. Wright died, but Black and Carol Kinney survived. App. 10.

White was convicted of murder in the first degree and sentenced to death in 1989. App. 1. Black and Carol Kinney testified for the State, identifying White as Wright's killer. App. 3, 10. White's defense was mistaken identity – that Wright's killer was a Jamaican drug dealer named A.J. Constantine. App. 3. Raymond Kinney, but not Deonta Kinney, testified for White. App. 3. Defense counsel did not interview or call Dorothy Merrell to the stand. App. 4. Merrell had said in a deposition that Constantine had threatened to kill her and her daughter in the past and had left her house, from which she sold crack cocaine, shortly before Wright was killed. App. 25-26.

White filed with the trial court a *pro se* motion for postconviction relief under Missouri Supreme Court Rule

29.15, raising twenty-nine distinct claims of ineffective assistance of counsel under the Sixth Amendment. App. 110, 479. The trial court appointed the state public defender's office to represent White. App. 110. White's first postconviction counsel secured a thirty-day extension to file an amended motion; the court set November 23, 1989, as the due date. App. 111. Counsel moved to withdraw, and simultaneously was replaced by new counsel. App. 126-27. Five days later, White executed two blank verifications of amended Rule 29.15 motions yet to be written. App. 111. Counsel prepared a first amended motion, which he untimely filed, on November 27, 1989. App. 112. Disregarding Rule 29.15(f), which authorizes a single extension of time to file an amended motion, counsel requested additional time to file a second amended motion. App. 112, 127, 219. After the request was granted, counsel filed a second amended motion. App. 112. The trial court denied White's motions. App. 112.

Two separate appeals to the Supreme Court of Missouri followed. App. 200, 212. The Court ultimately held that unauthorized withdrawal of White's first postconviction counsel and second postconviction counsel's filing of untimely amended motions amounted to abandonment, excusing the noncompliance with the time limitations on Rule 29.15. App. 222-24. As a remedy, the Supreme Court ordered the trial court to consider the claims raised in White's first, but not second, amended motion. App. 228. The Court noted that Rule 29.15 did not authorize a second extension to file a second amended motion. App. 215, 221-22. It agreed with the State that ordering appointment of new counsel and additional time to file a *third* amended motion – the remedy White sought – was inappropriate. App. 228. It was inappropriate because "White was only abandoned with regard to the timing of his first amended motion, not as to its content." App. 228. That is, neither White nor second postconviction counsel testified at the abandonment hearing (held in the trial court) that the first amended motion omitted grounds for relief known to White

when it was filed. App. 226. The Court noted that "[w]hen White signed the verification in blank [of the first amended motion], he waived all his rights to complain about its content." App. 220.

On remand, the trial court concluded that White had procedurally defaulted the claims raised in his *pro se* and first amended motion. App. 234-35. They were defaulted because White failed to plead facts, as required by Rule 29.15(e). App. 234-35. The trial court thus denied relief under Rule 29.15. App. 234-35. The denial was affirmed by the Supreme Court of Missouri. App. 260.

White filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the federal District Court for the Western District of Missouri. App. 1-2. The district court denied the petition. App. 1-2, 124. It concluded that White was procedurally barred from raising the majority of the claims he had raised in his first amended Rule 29.15 motion (because of his violation of Missouri's fact-pleading rule) and all the claims in his second amended Rule 29.15 motion (because under Missouri law that motion was improper). App. 128, 130-31. The district court found the adequacy of the Supreme Court of Missouri's abandonment remedy to be "beyond this Court's consideration." App. 150.

White appealed. The Eighth Circuit Court of Appeals held that the Supreme Court of Missouri's abandonment remedy was neither firmly established nor readily ascertainable and so an inadequate bar to review of the claims raised in White's petition. App. 115. Regarding the Missouri Supreme Court's distinction between abandonment as to timing and as to content, the Court of Appeals said

> the basis for the distinction is unclear to us . . . We cannot see why such an abandonment, forcing [] White's second attorney to prepare and write a motion in fourteen days would not include the content of the motion. [] White's attorney lacked the time to write a motion because he lacked the time to write its content.

> With no concern for content, one day would have been sufficient. . . . [W]e have no trouble finding that neither [] White nor his attorneys could reasonably have anticipated any such rule in advance of its first application in [] White's own case.

App. 115-16. The Court of Appeals did not dispute the State's contention that the remedy afforded White was consistent with prior state precedent. App. 116. "Even if, as Missouri argues, this rule forms a consistent pattern with prior precedent," the Court of Appeals held, "we could not apply it as a procedural default in this case." App. 116. The case was reversed and remanded "for consideration of [] White's constitutional claims, except those claims that the District Court has already addressed on the merits." App. 120. Petitioner unsuccessfully sought a writ of certiorari from this Court. See *Luebbers v. White*, 531 U.S. 917 (mem. Oct. 2, 2000).

After the district court decided the merits of only the claims White had (originally) raised in his second amended Rule 29.15 motion, White appealed. App. 63. The Court of Appeals acknowledged that its first opinion was unclear and that an assumption of the opinion ("that overcoming of the procedural rule barring the second amended motion would be determinative of the case") may have been "mistaken," because some of the claims in the second amended motion violated Missouri's fact-pleading requirement. App. 67. Invoking the law of the case, though, the Court held that the district court should have considered "all federal constitutional claims that have not previously been decided on the merits[,]" even if the claims were never raised in any of White's postconviction motions. App. 65, 67.

On remand, the district court held that trial counsel's inadequate investigation and failure to call two witnesses, Deonta Kinney and Dorothy Merrell, deprived White of his right to effective assistance under the Sixth and Fourteenth Amendments. App. 23-27 Deonta's testimony "would have implicated [a third person named] Constantine and exculpated

[White]" because he would have identified Constantine "as the man who entered with Buckner, and no plausible explanation has been offered as to why Deonta could not or should not have been called." App. 25. Dorothy Merrell's testimony would have "place[d] Buckner and Constantine together shortly before the crime." App. 26. The district court acknowledged that "Deonta was a young child, which may be a negative factor in his credibility," and that Merrell "was not an eyewitness to the crime, and her credibility may be suspect given that she was a crack dealer." App. 26. Still, the district court found, their testimony "may have changed the outcome," and it was "not confident in the jury's verdict and believe[d] there [was] a reasonable possibility that the outcome would have been different had Deonta and Dorothy testified." App. 26-27. So the district court (fourteen years after White was convicted) issued a writ of habeas corpus, vacating White's conviction and sentence. App. 61.

The Court of Appeals affirmed. App. 2. Regarding the strong presumption that trial counsel did not call Deonta and Merrell to testify because of sound trial strategy, the Court of Appeals said that "[t]he principle is certainly sound, but we disagree that it applies in this case." App. 5. Concluded the Court of Appeals: "[T]he district court properly found it inexplicable that only the boy with the weaker supporting testimony [i.e., Raymond Kinney] was called, rather than both [Raymond and Deonta Kinney], and properly found no apparent justification for failing to call [Dorothy] Merrell." App. 6. The Court of Appeals did not address petitioner's argument (repeated in his motion for rehearing) that Merrell's testimony would have been inadmissible under Missouri law. App. 457-59.

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari because of the Court of Appeals' flawed ineffective-assistance-of-counsel analysis and misinterpretation of the adequacy prong of the adequate and independent state law doctrine – both of which are inconsistent with this Court's precedent. Regarding the former: the Court of Appeals held counsel ineffective for not trying to admit evidence inadmissible under a Missouri rule identical to the South Carolina rule currently before this Court; faulted counsel for doing a reasonable investigation, yet did not specify – as this Court and the federal (and state) courts of appeals require – what new and useful information counsel would have learned from a broader investigation; and required petitioner, in violation of *Strickland v. Washington*, 466 U.S. 668 (1984), to shoulder the burden of producing reasons why counsel did not call certain witnesses. Regarding the latter: the Court of Appeals' holding that a procedural bar was inadequate not because of the inadequacy of the bar itself, but because of inadequacy of the retroactive judge-created exception to the bar (an exception from which defendant had no legitimate expectation he would benefit) contravenes *Ford v. Georgia*, 498 U.S. 411 (1991).

I.

The Court of Appeals affirmed the district court's decision holding defense counsel ineffective for failing to conduct an adequate investigation and for not calling two witnesses, Deonta Kinney and Dorothy Merrell. This holding warrants further review for three reasons. First, this Court's precedent provides that defense counsel cannot be inadequate for not trying to admit inadmissible evidence. Merrell's testimony would have been inadmissible under a Missouri rule of evidence identical to the South Carolina rule whose constitutionality is before this Court. See *Holmes v. South*

Carolina, 126 S.Ct. 34 (Sept. 27, 2005). Second, the Court of Appeals' decision contravened *Strickland v. Washington*, 466 U.S. 668 (1984), in holding counsel's investigation to be unreasonable, and also created a circuit split in the federal courts of appeals. The other federal courts of appeals have consistently held that defense counsel conducts an inadequate investigation only if a more thorough investigation would have yielded additional information of assistance to the defense. The unique rule in the Court of Appeals eliminates the need to identify new information and how it would have helped the defendant. Third, in this Court and in the federal courts of appeals, the burden of disproving reasonable strategic reasons for not calling a witness rests on the defendant. The Court of Appeals shifted that burden to State. In any case, defense counsel had sound reasons not to call Deonta Kinney.

A. Defense counsel cannot be ineffective for not trying to present inadmissible testimony.

The Court of Appeals found defense counsel ineffective, in part, because he did not have Dorothy Merrell testify. App. 6. Merrell's testimony, according to the Court of Appeals, was "powerful" support for respondent's mistaken identity defense. App. 5. But Merrell's testimony would have been inadmissible under a Missouri rule of a evidence identical to the South Carolina rule whose constitutionality is before this Court in *Holmes v. South Carolina*, 126 S.Ct. 34 (cert. granted Sept. 27, 2005). Counsel cannot be ineffective for not trying to present inadmissible testimony. Compare *Wiggins v. Smith*, 539 U.S. 510, 535 (majority opinion) (2003) with *id.* at 554 (Scalia, J., dissenting); see also *United States v. Buchbinder*, 796 F.2d 910, 917 (7th Cir. 1986); cf. *Wood v. Bartholomew*, 516 U.S. 1, 5-7 (1995). This Court should hold this petition pending a decision in *Holmes v. South Carolina*.

Missouri's evidence law, like South Carolina's, provides that evidence implicating a third party in a crime is inadmissible

unless the evidence is "of the kind that directly connects the other person with the *corpus delicti* and tends clearly to point to someone other than the accused as the guilty person." Compare *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. 1998) (en banc) with *State v. Holmes*, 361 S.C. 333, 342 (2004), *certiorari granted in part by Holmes v. South Carolina*, 126 S.Ct. 34 (Sept. 27, 2005). "Acts that are . . . outside the crime itself cannot be separately proved for such purpose." *State v. Wilson*, 105 S.W.3d 576, 583 (Mo. App. 2003). Given these rules of evidence, no Missouri court would have allowed Merrell to testify.

In her deposition, Dorothy Merrell, a crack cocaine dealer at the time of the attacks, identified a picture of A.J. Constantine as a person she knew as a Jamaican who went by the name "Jay" or "A.J." App. 283-84. She considered him dangerous because he had threatened to kill her daughter and her daughter's boyfriend, Benjamin Kinney (Carol Kinney's brother), the father of Merrell's grandchildren. App. 281-84. According to Merrell, Benjamin had used A.J.'s drugs, instead of selling them. App. 284. To protect her daughter and her daughter's boyfriend, Merrell said that she agreed to sell drugs for A.J. App. 284. The night of January 5, 1997, A.J. and Buckner came to her house looking for drugs, said Merrell, and made a deal with Wright (in the presence of Carol Kinney) to buy some drugs. App. 3, 290, 293. Merrell said that after making the deal and after Wright and Carol Kinney left Merrell's house, Buckner and A.J. left, saying they were going to get some drugs. App. 294. Merrell never said she saw where A.J. went after leaving her house, let alone that she had observed the attacks on Wright, Kinney, and Black.

Merrell's testimony would not clearly have pointed to A.J. Constantine as Wright's killer, as the Missouri (and South Carolina) rule requires. Merrell was not an eyewitness to the murder; nor did she see A.J. go in the direction of or arrive at or near Wright's house. App. 26. So her testimony does not even establish A.J.'s opportunity to commit the murder. Nor does

her testimony reveal A.J.'s motive for wanting to harm or kill Wright. True, Merrell's testimony showed that A.J. had (sometime in the past) threatened to kill Benjamin Kinney and his girlfriend (i.e., Merrell's daughter). But she never said A.J. had threatened to harm *Wright*.[1] Nay, she said that (1) it was Roger Buckner who told Benjamin Kinney that "he was there to kill us [Benjamin, his girlfriend, and Dorothy Merrell]" and (2) A.J. did not kill them, because "I [like Wright] didn't have any drugs in the house." App. 289. At most – and only by being overly charitable – Merrell's testimony would have indicated that A.J. had a (possible) motive and opportunity to harm Wright and Kinney. But such evidence by itself would have been inadmissible, because it does not clearly establish A.J. as Wright's murderer. See *State v. Wise*, 879 S.W.2d 494, 510-11 (Mo. 1994) (en banc); *Evans v. State*, 85 S.W.3d 750, 754 (Mo. App. 2002). Because Merrell's testimony would have been inadmissible, the Court of Appeals erred in faulting defense counsel for not trying to present it to the jury.

B. The Court of Appeals contravened *Strickland v. Washington* in interpreting the scope of defense counsel's investigative duties and in so doing created a circuit split.

The Court of Appeals held that defense counsel conducted a "superficial" investigation because counsel "did not interview Deonta Kinney and Dorothy Merrell, did not attend co-defendant Buckner's trial, and did not have copies of [Deonta and Raymond Kinney's] transcripts until the eve of trial." App. 4. Had counsel done these things, the Court of Appeals said, he would have discovered "important exculpatory information." App. 4. Thus, the Court of Appeals held that "the presumption

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[1]Merrell's testimony about A.J.'s threats was also inadmissible because it did not establish a threat to the victims, but to a third party. See *State v. Barriner*, 34 S.W.3d 139, 148 (Mo. 2000) (en banc).

of sound trial strategy [regarding the decision not to call Deonta Kinney and Dorothy Merrell] founders in this case on the rocks of ignorance as in *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003)." App. 6 (citation altered).

The Court of Appeals' decision is inconsistent with *Strickland v. Washington* and created a circuit split. There are two reasons why. One, defense counsel's investigation regarding Deonta and Raymond Kinney's likely testimony was reasonable, which is all *Strickland* requires. Two, an investigation cannot be inadequate unless a broader investigation would have yielded additional information of assistance to the defense. In all likelihood, no such information would have turned up had defense counsel done what the Court of Appeals said he should have done.

Criminal defendants are entitled to effective assistance of counsel under the Sixth Amendment. But "[t]he Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) (per curiam). One duty of effective counsel is to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690-91). "[T]he duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 125 S.Ct. 2456, 2463 (2005); accord *United States v. Decoster*, 624 F.2d 196, 211 (D.C. Cir. 1976) (en banc) ("If given an unrestricted budget and freed of any constraints as to probable materiality or accountability, a lawyer might have cheerfully logged in many hours looking for the legal equivalent of a needle in a haystack. . . . . [A] defendant is not entitled to perfection but to basic fairness.").

Defense counsel's decisions not to interview or depose Deonta Kinney and not to attend co-defendant Buckner's trial (at which Deonta testified) were reasonable. See *Griffin v.*

Wainwright, 760 F.2d 1505 (11th Cir. 1985), *vacated on other grounds by Griffin v. Wainright*, 476 U.S. 1112 (1986); *Fynn v. State*, 763 S.W.2d 210, 211-12 (Mo. App. 1988). All the "important exculpatory" information with respect to Deonta was (*pace* the Court of Appeals) within the documents already in counsel's possession. Counsel had copies of the transcripts from the Buckner trial, including Deonta and Raymond's testimony; copies of their depositions; and copies of the police reports and their statements to the police. App. 23-24. Therein, the Kinneys go into great detail describing the attacks (to the extent they observed them) and the events surrounding the attacks. App. 299-455, 470-73. They describe, for instance, A.J.'s involvement in the Wright murder; in fact, Raymond identifies A.J. as the man who slit Wright's throat, though Deonta admits he did not see that happen. App. 374, 444-45.

It should not matter (as it did to the Court of Appeals) that counsel did not have the depositions until the "eve of trial." For that does not mean, and the district court never found, that counsel was unable to imbibe their contents; though thorough, the depositions were not voluminous. Nor should it matter that counsel did not attend co-defendant Buckner's trial. No case from this Court or the federal courts of appeals has held that defense counsel has a duty to attend the murder trial of a co-defendant (involving the same murder for which defendant is on trial). In fact, the Court of Appeals had previously rejected any such duty, in *Withram v. Mabry*, 596 F.2d 293, 299 (8th Cir. 1979), a case that goes unmentioned in the Court of Appeals' decision. In *Withram*, the Court of Appeals noted that the defendant had not "even intimated how the trial of his case was hindered by [counsel's] failure to attend [co-defendant's] trial. It was not an unreasonable decision for [counsel] to determine that his time . . . was better spent preparing for his client's case in some manner other than sitting through days of testimony." *Id.* The same is true of White's case.

The Court of Appeals attributes its disposition to *Wiggins v. Smith*, 539 U.S. 510 (2003). In *Wiggins*, this Court found

defense counsel's "cursory investigation" into a capital defendant's background was unreasonable and thus rebutted the presumption that the non-production of mitigating evidence during the penalty phase was the result of reasoned strategic judgment. *Id.* at 526-27. But "[t]he mitigating evidence counsel failed to discover and present . . . [was] powerful." *Id.* at 534. And counsel apparently failed to expand the investigation out of inattention, not strategic judgment. *Id.* at 526. Here, in contrast, the record indicates that counsel had ample information from which to make a sound decision whether to have Deonta (or Raymond) to testify. Cf. 539 U.S. at 524 (describing counsel's knowledge as "rudimentary").

In its willingness to fault defense counsel without identifying what benefit a more thorough investigation would have produced, the Court of Appeals contravened a long line of precedent from the federal courts of appeals and state appellate courts. That precedent establishes that an investigation cannot be inadequate unless a broader one would have yielded new information of help to the defense. See *Turner v. Williams*, 35 F.3d 872, 896 (4th Cir. 1994); *United States v. Ashimi*, 932 F.2d 643, 649 (7th Cir. 1991); *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986); *Jones v. Smith*, 772 F.2d 668, 674 (11th Cir. 1985); *United States v. Schaflander*, 743 F.2d 714, 718 (9th Cir. 1984); *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc); *Weaver v. State*, 114 P.3d 1039, 1043-44 (Mont. 2005); *Brown v. State*, 846 So.2d 1114, 1124 (Fla. 2003); *Rondon v. State*, 711 N.E.2d 506, 518 (Ind. 1999); *Lien v. Class*, 574 N.W.2d 601, 608 (S.D. 1998); *Commonwealth v. Haas*, 501 N.E.2d 1154, 1157 (Mass. 1986); *In re Personal Restraint of Pirtle*, 965 P.2d 593 (Wash. 1998).

The record, moreover, does not even hint that counsel would have learned anything useful had he broadened his investigation in the manner required by the Court of Appeals. Had counsel deposed or interviewed Deonta, it is unclear what questions he could have asked Deonta that Deonta had not already answered, except, "Are you sure?" See *State v.*

Thomas, 462 N.W.2d 862, 868 (Neb. 1990). Counsel's attendance at the Buckner trial would have given him an opportunity to gauge the credibility of the State's witnesses and of Deonta and Raymond by observing their demeanor. But that opportunity would have been of limited, and perhaps no, use. "[D]espite much lore to the contrary, it appears that it is actually more difficult to assess the credibility of oral than of written testimony." *Carradine v. Barnhart*, 360 F.3d 751, 753 (7th Cir. 2004) (Posner, J.) (citing research); Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1075 (1991). Counsel wisely eschewed reading the tea leaves of demeanor and instead focused on Deonta and Raymond's written testimony.

C. The burden of disproving sound trial strategy was respondent's, not petitioner's.

In *Strickland v. Washington*, this Court established that the burden of disproving the existence of sound reasons for not calling witnesses rests on the defendant. 466 U.S. at 688-89; *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Here, though, the Court of Appeals placed that burden on petitioner. It held that "the district court properly found it inexplicable that only the boy with the weaker supporting testimony was called, rather than both [Deonta and Raymond Kinney], and properly found no apparent justification for failing to call Merrell." App. 6. The Court of Appeals agreed with the district court that "no plausible explanation has been offered why Deonta [Kinney] could not or should not have been called." App. 25. Under *Strickland*, though, petitioner had no obligation to produce reasons why defense counsel decided not to call Dorothy Merrell and Deonta Kinney; nor did petitioner have to satisfy any purported "plausibility" burden. It was White's burden to disprove any reasonable grounds for not calling these witnesses. The Court of Appeals' decision to shift the burden merits review, if not reversal.

In fact, the record reveals an obvious reason not to call Deonta Kinney: He was less credible and knowledgeable than Raymond – or so competent counsel could conclude. Cf. *Yarborough*, 540 U.S. at 9 ("The issues counsel omitted were not so clearly more persuasive than those he discussed that their omission can only be attributed to a professional error of constitutional magnitude."). In his deposition, Raymond said that he had seen portions of the attacks (having peeked into the front rooms where they took place), and saw A.J. slit Wright's throat. App. 441-44. Afterward, he woke up Deonta, who, scared, got back in bed and pretended to be asleep. App. 367. (Raymond had insomnia, whereas Deonta had no trouble falling asleep. App. 363.) Deonta specifically denied having seen Wright get attacked. App. 374 ("Q: Did you see the man cut [Wright's] throat? A: No.").

Deonta occasionally jumbled together different events, in the process confusing the questioner. App. 360, 373 ("Q. Now, you've jumped ahead of me quite a bit there. I was talking about the three men that were over at Bam's."; "I want to try to get this in order, I mean, what happened first and then happened second and then third. Okay?"). Deonta, who was eight years old at the time of the attacks, was also "shy and scared" during the police's interview of him; there is no such indication regarding Raymond. App. 470.

Deonta's recollection of events was at times implausible. He said that police cars had been driving up and down the street outside his uncle's house (where he was staying); that a helicopter was flying overhead, shining a spotlight on the house; and that the dealers at his uncle's, afraid the police might barge in, burned up some cocaine in an oven. App. 354-56. No other witness recalled such salient events. Deonta said that, after the attackers left, he asked Ernest Black what happened, and Black said, "The fat, chubby one hit me with a gun." App. 383. The phrase, "the fat, chubby one," was his and his brother's. It is unlikely that Black, an adult who (according to the defense) knew his attacker, would describe him as "the fat,

chubby one." Deonta also purported to remember things that a child probably would not – for instance, that his mother (Carol Kinney) had called him at exactly 9:06 p.m. (this despite all the exciting activities taking place at his uncle's). App. 353.

Deonta's deposition and trial testimony was also internally inconsistent. At first, he said that only one of the three men who were at his uncle's house, and later at Wright's, spoke with a Jamaican accent. App. 357-59. Then he said two did. App. 357-59. Asked whether he was sure the three men at Wright's house were at his uncle's, he said yes, but then retracted that statement by saying, "Yes, they might be." App. 361. Deonta also equivocated about whether the man he knew as A.J. and saw at Wright's house had been at his uncle's house earlier in the day, stating that he "looked exactly like the one that came to our house." App. 361. Initially, Deonta said that when he saw A.J. at his uncle's house A.J. had on dress pants and a dress shirt; later he said he could not remember what A.J. had been wearing; still later, he said that A.J. was wearing jeans at his uncle's. App. 368, 377. Deonta said that A.J. had a Jerri curl (a hairstyle); later, he said that A.J. did not have a Jerri curl; still later, he could not remember whether any of the men in Wright's house had a Jerri curl. App. 327, 337-39, 384-85. In his deposition, he said a man with a Jerri curl retrieved a knife from the kitchen; in his testimony at the Buckner trial, he said a man with a "natural hairdo" retrieved the knife. App. 319, 376.

Not only was Raymond the more credible and knowledgeable witness; the jury had already learned about Deonta's identification of Constantine from another witness. Detective Lee Floyd testified that, while interviewing Deonta regarding the attacks, Deonta selected and recognized Constantine's picture out of an array of photos. App. 487. Also, Deonta's testimony likely would have *undermined* White's mistaken-identity defense. The Court of Appeals, like the district court, placed great importance in Deonta's willingness to identify Constantine as the attacker. But

Detective Floyd testified that Deonta had *denied* that Constantine was one of the assailants at Wright's house. App. 487. Deonta had also said that, though he had picked out A.J.'s (i.e., Constantine's) picture, he did not have a chance to look at the pictures "real well"; that he never got a good look at the men who were at his uncle's house; and that he did not know whether any of the other men in the photo lineup, including Roger Buckner (who was sentenced to life imprisonment for his involvement in Wright's murder), was at Wright's house. App. 326, 398, 426. And, as noted before, Raymond, not Deonta, had seen Wright get his throat slit. Moreover, even if Deonta were as credible and knowledgeable as Raymond, his testimony was essentially redundant. See *Clabourne v. Lewis*, 64 F.3d 1373, 1382 (9th Cir. 1995) (Kozinski, J.). To get an acquittal, defense counsel only needed to convince the jury that White was not at Wright's house when the murder took place. He did not have to prove that a specific third party (here, Constantine) committed the crime. Faulting defense counsel for not trying to prove two propositions when proof of one would result in acquittal is perverse. In any event, the district court should have held that White was estopped to complain about his counsel's decision not to call Deonta. Under oath, White said he agreed with counsel's decision not to call Deonta to the stand, and that counsel and he had gone over the reasons pro and con regarding having Deonta testify. App. 466-67; see *Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."). But again, under *Strickland*, it was not petitioner's burden to produce reasons, let alone convincing ones, for not having Deonta testify. See also *United States v. Schmidt*, 105 F.3d 82, 90 (2nd Cir. 1997) ("[T]he tactical decision of whether to call specific witnesses – even ones that might offer exculpatory evidence – is ordinarily not viewed as a lapse in professional representation."). The Court of Appeals should not be allowed to reject *Strickland* and foist that burden on the petitioner.

II.

The Court of Appeals held that Missouri's abandonment remedy (allowing consideration of White's claims in his first, but not second, amended motion) was an inadequate bar to federal habeas review. That decision contravenes *Ford v. Georgia*, 498 U.S. 411 (1991), improperly expanding the scope of the adequacy requirement of the independent and adequate state law doctrine. Even on its own terms, the Court of Appeals' adequacy analysis is flawed. White had no legitimate expectation that the Supreme Court of Missouri would allow him to avail himself of the abandonment doctrine. And the abandonment remedy afforded White was mandated by precedent preceding White's first postconviction appeal and by routine remedial principles.

A. The Court of Appeals' adequacy analysis is inconsistent with this Court's precedent.

In *Ford v. Georgia*, this Court held that a state procedural rule, which the Supreme Court of Georgia invoked *sua sponte* to bar consideration of a *Batson* claim, was an inadequate bar to habeas review. 498 U.S. at 417, 425. The procedural rule required that *Batson* claims be raised "not only before trial, but in the period between the selection of the jurors and the administration of their oaths[.]" Though "sensible," the rule was an inadequate bar because, this Court held, it was not firmly established and regularly followed. *Id.* at 422-24. That is, at the time of Ford's trial, the rule did not exist; the Supreme Court of Georgia adopted it two years later, in *State v. Sparks*, 355 S.E.2d 658, 659 (Ga. 1987). 498 U.S. at 424. Concluded this Court:

> To apply *Sparks* retroactively to bar consideration of a claim not raised between the juror's selection and oath would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve

> as an independent state ground within the meanings of [*James v. Kentucky*, 466 U.S. 341 (1984)]. Indeed, the Georgia court itself in *Sparks* disclaimed any such effect for that decision.

498 U.S. at 424.

Here, in contrast to *Ford*, the state procedural rule barring habeas review of the claims in White's second amended motion, Rule 29.15, was firmly established and regularly followed at the time of White's postconviction proceedings. Missouri case law had held that Rule 29.15's requirements, in particular its time limitations, see Rule 29.15(b), (f), were "valid and mandatory," *Day v. State*, 770 S.W.2d 692, 695 (Mo. 1989) (en banc); all claims raised in an untimely postconviction motion (amended or not) were waived. *Id.*; *Sloan v. State*, 779 S.W.2d 580, 581-82 (Mo. 1989) (en banc), *abrogated on other grounds by Sanders v. State*, 807 S.W.2d 493, 494, 494 n.1 (Mo. 1991) (en banc); *Luster v. State*, 795 S.W.2d 109, 111 (Mo. App. 1990); see also *Rice v. State*, 779 S.W.2d 771, 775 (Mo. App. 1989). So it was well established that when White filed his untimely amended motions (on November 27, 1989, and January 9, 1990) he waived the claims in both.

The Court of Appeals did not disagree. Its sole complaint concerned the adequacy of the abandonment remedy crafted by the Supreme Court of Missouri to *excuse* White's procedural default. But the independent and adequate state law doctrine bars review of a question of federal law if the decision of the state court rests on a state law ground independent of the federal question and adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). That doctrine does not concern itself with the adequacy of a state court's retroactive application of a judge-created exception to a procedural bar. Cf. Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1141 (1986). ("[N]o case has held that a state procedural ground is inadequate simply because the state court possessed but did not exercise discretion to excuse the procedural default."). The Court of Appeals'

decision creates a conceptual confusion – an exception to a procedural bar is deemed inadequate, though the exception does not bar a petitioner's claims, but rather allows consideration of (some) claims.

B. Respondent had no reason to anticipate the retroactive application of a judge-created exception to his state procedural default.

The justification for the *Ford* decision is that the rules of the judicial game should not change in the middle of the game to the detriment of the defendant. But the Court of Appeals stands *Ford* on its head. Neither at the time of White's postconviction proceedings (the relevant period for a postconviction rule, such as Rule 29.15, see *Ford*, 498 U.S. at 424) nor during his appeals to the Supreme Court of Missouri did White have a legitimate expectation that the doctrine of abandonment would apply to his case. So the adequacy of the abandonment remedy crafted by the Supreme Court of Missouri was irrelevant.

The doctrine of abandonment did not exist during the pendency of White's postconviction proceedings in the trial court. Before and after White filed his Rule 29.15 motions, Missouri courts had rejected abandonment by postconviction counsel as an excuse for noncompliance with the requirements of Missouri's postconviction rules (such as Rule 29.15). See *State v. Berry*, 798 S.W.2d 491, 495 (Mo. App. 1990); *Crandall v. State*, 785 S.W.2d 780, 781 (Mo. App. 1990); *Evans v. State*, 782 S.W.2d 402, 403-04 (Mo. App. 1989). Not until June 19, 1990 – nearly five months after White filed his second amended motion – did the Supreme Court of Missouri opine that it might be possible to excuse the untimely filing of an unverified amended motion if the untimeliness was "not attributable to movant's intentional or negligent conduct and was due entirely to an ambiguity in [Rule 29.15]." *Kilgore v. State*, 791 S.W.2d 393, 396 (Mo. 1990) (en banc). Not until April 9, 1991, long after the trial court first disposed of White's

motions, did the Supreme Court of Missouri hold that abandonment by postconviction counsel warranted excusing noncompliance with Rules 29.15(e) and (f). See *Sanders*, 807 S.W.2d at 493; *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991) (en banc). "Until today," said the Supreme Court of Missouri, "this Court has not deviated from its firm position that failure to timely file a motion constitutes a complete bar to consideration of a movant's claims, even when the claims are attributable entirely to inaction of counsel." *Sanders*, 807 S.W.2d at 494 (collecting cases).[2]

There are other reasons why White had no legitimate expectation that the Supreme Court of Missouri would allow him to benefit from the abandonment doctrine. In general, and particularly in the context of a Rule 29.15 action, Missouri prohibits the raising of claims on appeal not first presented to the trial court. See, *e.g.*, *Clemmons v. State*, 795 S.W.2d 414, 418 (Mo. App. 1990). White raised abandonment for the first time on appeal; that was improper. See *Johnson v. State*, 768 S.W.2d 158, 160 (Mo. App. 1989). Moreover, because *Sanders* and *Luleff* did not say whether the abandonment doctrine would apply retrospectively and because abandonment is a procedural rule (for it merely excuses noncompliance with Rule 29.15's procedural requirements), see *State v. Callen*, 45 S.W.3d 888, 890 (Mo. 2001) (en banc); *Boydston v. State*, 26 S.W.3d 845, 847 (Mo. App. 2000); *State v. Ford*, 867 S.W.2d 681, 684 (Mo. App. 1993), a reasonable attorney would have predicted that the Supreme Court of Missouri would not apply it (retroactively) to White's case. See *State v. Walker*, 616 S.W.2d 48, 49 (Mo. 1981) (en banc). Far from setting "springes . . . for those who are endeavoring to assert rights," as

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[2] *Luleff* also held "that the appropriate forum for addressing claims regarding a complete absence of performance by postconviction counsel on a motion for postconviction relief [i.e., an abandonment claim] is in the [trial] court where the motion is being prosecuted by movant." 807 S.W.2d at 497. White argued abandonment for the first time on appeal.

the Court of Appeals put it, App. 115 (internal quotation marks omitted), the Supreme Court of Missouri conferred a windfall on White.

White's case is the converse of *Lee v. Kemna*, 534 U.S. 362 (2002). In *Lee*, this Court held two Missouri procedural rules (Rules 24.09 and 24.10) inadequate because of the "extraordinary circumstances" under which they were applied. *Id.* at 376. The rules were invoked – for the first time on appeal – as a bar to Lee's due process claim. *Id.* at 380. And "no published Missouri decision direct[ed] flawless compliance with Rules 24.09 and 24.10 in the unique circumstances [of Lee's case]." *Id.* at 382. In contrast, White had adequate notice of the procedural bar here (Rule 29.15's timing requirements). Whereas Lee was harmed by the raising of procedural rules for the first time on appeal, White benefitted from a procedural-rule exception raised for the first time on appeal – an exception that did not exist at the time of White's postconviction proceedings in the trial court, but that should have been, but was not, raised then. If a habeas petitioner's attempt to seek review of a claim should not be frustrated by the unexpected application of a trial-court rule applied for the first time on appeal, neither, by parity of reasoning, should a habeas petitioner be heard to complain about the inadequacy of the unexpected application for the first time on appeal of an exception to a trial-court rule.

C. The scope of the abandonment remedy deemed unprecedented by the Court of Appeals was mandated by established state precedent and ordinary remedial principles.

The Court of Appeals erred in holding that the Supreme Court of Missouri's abandonment remedy (consideration of the claims in the first, but not second, amended Rule 29.15 motion). That remedy was mandated by state precedent and ordinary remedial principles, in contrast to the remedy White sought (appointment of new counsel and the time to file a third

amended motion). So the Court of Appeals' adequacy analysis is wrong by its own terms.

As the Supreme Court of Missouri noted, the abandonment remedy afforded White was identical to that in *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991) (en banc). App. 223. There, postconviction counsel abandoned the movant by filing an amended Rule 29.15 motion out of time. *Id.* at 494. "[W]here the record reflects that counsel has determined that there is a sound basis for amending the *pro se* motion but fails to timely file the amended motion as required by Rule 29.15(f)," the Supreme Court held, "[t]he failure is, in effect, another form of 'abandonment' by postconviction counsel." *Id.* at 494-95. Hence, "[s]hould the failure to file a timely amended motion result from inattention of counsel, the court shall permit the filing." *Id.* at 495. Here, as in *Sanders*, White was abandoned by postconviction counsel's filing of an untimely first amended motion.

The remedy that White sought, that the Supreme Court of Missouri declined to grant, but that the Court of Appeals (tacitly) deemed the norm (appointment of new counsel and time to file another amended motion) would have been unprecedented. That remedy was the remedy granted the movant in *Luleff v. State*, 807 S.W.2d 495 (Mo. 1991) (en banc) But in *Luleff* the movant had been abandoned by the "complete absence of performance by postconviction counsel[.]" 807 S.W.2d at 497. Counsel never entered his appearance, never communicated with his client, never filed an amended motion. *Id.* at 498. White's counsel did not completely abdicate his responsibilities – he met with White and filed two amended motions, raising multiple claims of ineffective assistance.

Two years before the Supreme Court of Missouri held that White had been abandoned, it rejected an abandonment-remedy argument identical to White's. In *State v. Ervin*, postconviction counsel filed an untimely amended Rule 29.15 motion. 835 S.W.2d 905, 928 (Mo. 1992) (en banc). Notwithstanding the

motion's untimeliness, the trial court held a hearing on the movant's claims. *Id.* On appeal to the Supreme Court of Missouri, the movant insisted that the proper remedy for his abandonment by postconviction counsel was appointment of new counsel, time to file a new and timely amended motion. and a hearing on the new motion. *Id.* Not only did the Court disagree (citing *Sanders*, as did the Court in White's case); it branded the movant's argument "odd[.]" *Id.*

Nor was White's case factually unique. In *Pollard v. State*, 807 S.W.2d 498 (Mo. 1991) (en banc) – decided the same day as *Sanders* and *Luleff* and three months before the Supreme Court disposed of White's first postconviction appeal – the Supreme Court ratified the identical remedy for a Rule 29.15 movant in the same position as White. The movant in *Pollard* filed a pro se Rule 29.15 motion; postconviction counsel requested a thirty-day extension (which was granted), did not file an amended motion, and was replaced by different counsel, who filed an untimely amended motion. *Id.* at 500. The case is factually indistinct from White's, with the sole exception that the trial court had considered the claims raised in the movant's untimely amended motion. *Id.* The movant, citing *Sanders* and *Luleff*, claimed that he had been abandoned by postconviction counsel. *Id.* at 502. The Supreme Court agreed, but concluded that the movant suffered no prejudice because the trial court considered the claims in the untimely amended motion. In short, *before White's case ever wended its way before the Supreme Court of Missouri*, that Court had approved the very remedy White received in a case factually identical to White's. The Court of Appeal's conclusion that the remedy afforded White was unpredictable was wrong.[3]

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[3]Granted, the Supreme Court of Missouri did hold that White's first postconviction counsel abandoned him by withdrawing without leave of court. But hitherto no Missouri court had ever held or implied that unauthorized withdrawal of postconviction counsel – much less withdrawal and immediate replacement by another attorney – constituted abandonment.

The Supreme Court of Missouri's abandonment remedy was also consistent with routine remedial principles. It is a well-known principle of equity that the nature of the wrong determines the scope of relief. *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 16 (1971). The harm caused by postconviction counsel's abandonment of White was the untimely filing of a first amended motion. The harm was not, as the Eight Circuit implied, the inability of White to raise all the claims he wanted to raise. As the Supreme Court of Missouri noted, neither White nor his second postconviction counsel complained of insufficient time to raise all White's grounds for relief in the first amended motion. Not until the district court proceedings did White contend otherwise. And by executing the blank verifications, White, as the Supreme Court of Missouri held, waived any claims not included in his first amended motion. See Rule 29.15(b) ("The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion."). Allowing consideration of White's second amended motion would have rewarded White's inequitable conduct (i.e., his false verifications), in violation of the hoary maxim, which Missouri has long followed, that a seeker of equity must have clean hands. See *Colbert v. Nichols*, 935 S.W.2d 730, 734 (Mo. App. 1996); see

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A new form of abandonment was created in White's appeal. Because it was new, it follows that White had no expectation that he could benefit from it. The adequacy of the remedy for this form of abandonment was thus irrelevant. Also notable is that since White's case no Missouri court has recognized unauthorized withdrawal of postconviction counsel as abandonment. In fact, the Supreme Court of Missouri has repeatedly held that there are only two forms of abandonment (*Luleff* and *Sanders* abandonment), and has refused to mint new forms. *Barnett v. State*, 103 S.W.3d 765, 773-74 (Mo. 2003) (en banc) (collecting cases); but cf. *State v. Bradley*, 811 S.W.2d 379, 384 (Mo. 1991) (unverified amended motion; remanding for abandonment hearing).

also *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889) ("No one shall be permitted to profit by his own fraud.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
VOL. 1 OF 3

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United States Court of Appeals,
Eighth Circuit

Leamon WHITE, Petitioner--Appellee,

v.

Don ROPER, Respondent--Appellant.

No. 04-2772.

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Rehearing and Rehearing En Banc Denied Sept. 9, 2005. *

Charles W. Gordon, Jr., argued, Kansas City, MO (Ronald E. Partee on the brief), for appellee.

Before LOKEN, Chief Judge, BEAM and MELLOY, Circuit Judges.

LOKEN, Circuit Judge.

Leamon White was convicted of first-degree murder and sentenced to death by a Missouri state court in 1989. The Supreme Court of Missouri affirmed his conviction and sentence and the denial of state post-conviction relief. *State v. White*, 813 S.W.2d 862 (Mo. banc 1991), *cert. denied*, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992); *State v. White*, 873 S.W.2d 590 (Mo. banc 1994); *White v. State*, 939 S.W.2d 887 (Mo. banc), *cert. denied*, 522 U.S. 948, 118 S.Ct. 365, 139 L.Ed.2d 284 (1997). White then filed this petition for a federal writ of habeas corpus, which the district court denied. White

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*Judge Benton took no part in the consideration or decision of this matter.

appealed, and we held that certain constitutional issues were not procedurally barred from federal habeas review. *White v. Bowersox*, 206 F.3d 776 (8th Cir.), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000). After a second appeal, we concluded that the district court had misconstrued our prior remand order. We again remanded the case, directing the court "to decide on their merits all claims alleged in the petition for writ of habeas corpus, not previously decided on their merits." *White v. Luebbers*, 307 F.3d 722, 731 (8th Cir.2002), *cert. denied*, 538 U.S. 981, 123 S.Ct. 1785, 155 L.Ed.2d 671 (2003).

On remand, the district court[1] held an evidentiary hearing on the remaining claims. In a thorough opinion, the court granted the writ, concluding that White's trial counsel provided ineffective assistance in failing to investigate and present exculpatory testimony by two witnesses in the guilt phase, and in failing to present mitigating evidence in the penalty phase. The State of Missouri appeals only the guilt phase determination, conceding that White is entitled to penalty phase relief. On appeal, the State argues that White failed to demonstrate counsel's constitutionally deficient performance, and that the district court misapplied the prejudice standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Because the Supreme Court of Missouri did not rule on the merits of this ineffective assistance claim after an evidentiary hearing, there is no state court ruling to which we must defer under 28 U.S.C. § 2254(d). After careful review of the record, we affirm.

I.

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[1]The HONORABLE ORTRIE D. SMITH, United States District Judge for the Western District of Missouri.

We briefly recite the facts critical to this appeal; additional background facts were detailed in our earlier opinions. In the early morning hours of January 6, 1987, three men went to the home of Don Wright and his girlfriend, Carol Kinney, to obtain crack cocaine. The trio murdered Wright and attempted to murder Kinney and a guest, Ernest Black. Kinney and Black survived and identified White as one of the three perpetrators at trial. The other two assailants were Roger Buckner, who was found guilty after a bench trial in which the death penalty was waived, and Cleveland Ford, who pleaded guilty to a non-capital offense. White's defense at trial was that Kinney and Black were mistaken in identifying White and that the third assailant was in fact a Jamaican drug trafficker named A.J. Constantine. Though other witnesses linked White to Buckner and Ford and tended to support the testimony of Kinney and Black, no physical evidence linked White to the crime scene.

Kinney's two young sons, Deonta and Raymond, were in the house at the time of the crime and saw the assailants. Both boys testified at Buckner's trial, which took place prior to White's trial. Both boys testified that one assailant spoke with a Jamaican accent and was known as "A.J." Deonta identified a picture of Constantine as A.J. Raymond could not identify the picture of Constantine as A.J. At White's trial, Raymond was called as a defense witness. He testified that White was not an assailant but again could not identify Constantine as the third killer. Deonta was not interviewed by trial counsel and did not testify. He would have testified that White was not an assailant *and* would have identified Constantine as the third killer.

Earlier on the night of the murder, the victims of the attack--Wright, Carol Kinney, Black, Deonta, and Raymond--were at the home of Dorothy Merrell and Carol's brother, Ben Kinney, who ran a crack house. In the district court's evidentiary hearing, Merrell testified that Buckner and a companion arrived looking for drugs while the others were there. Wright said he

had drugs at his house and arranged to meet with Buckner at Wright's house later that night. Merrell testified that Buckner's companion was a Jamaican named Jay or A.J. Constantine. Similarly, Deonta told police after the attack that A.J. had been with Buckner at Merrell's house before the two came to Wright's house. Neither Deonta nor Mrs. Merrell knew White, and neither saw him on the night of the murder. Merrell was neither interviewed by defense counsel nor called as a witness at White's trial.

White's trial counsel, Robert Duncan, died in 1996, before the district court's evidentiary hearing. Second chair John O'Connor and Duncan's son, the defense investigator, both testified at the hearing. The district court concluded that counsel failed to conduct an adequate investigation because Duncan did not interview Deonta Kinney and Dorothy Merrell, did not attend Buckner's trial, and did not have copies of the boys' deposition transcripts from Buckner's case until the eve of trial. Lacking this important exculpatory information, counsel failed to call these two witnesses, who would have directly supported the defense theory of mistaken identification:

> Deonta's testimony directly implicated Constantine and exculpated [White]. Deonta's identity was known to counsel, a reasonable investigation would have revealed his identification of Constantine as the man who entered with Buckner, and no plausible explanation has been offered as to why Deonta could not or should not have been called.
>
> Coupled with this failure is the failure to call Dorothy Merrell ("Dorothy") to testify.... Dorothy identified Constantine's picture as a person she knew as a Jamaican drug dealer who went by the name "Jay" or "A.J." ... Her testimony places Buckner and Constantine together shortly before the crime, and describes

> circumstances that led to Buckner's and Constantine's departure to Wright's house. Dorothy's potential for having information was known to counsel .... *White v. Roper*, No. 97-1663, slip op. at 15-16 (W.D. Mo. June 14, 2004). The district court concluded that, by failing to investigate and call these two critical witnesses, "trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence," and this deficient performance prejudiced White's defense. *Nave v. Delo*, 62 F.3d 1024, 1035 (8th Cir.1995) (quotation omitted), *cert. denied*, 517 U.S. 1214, 116 S.Ct. 1837, 134 L.Ed.2d 940 (1996).

On appeal, the State argues that the district court's decision is contrary to the principle that trial counsel's failure to call witnesses, in this case Deonta Kinney and Dorothy Merrell, is presumed to be reasonable trial strategy. *See Fretwell v. Norris*, 133 F.3d 621, 627 (8th Cir.), and cases cited, *cert. denied*, 525 U.S. 846, 119 S.Ct. 115, 142 L.Ed.2d 92 (1998). The principle is certainly sound, but we disagree that it applies in this case. The strength of the presumption turns on the adequacy of counsel's investigation:

> strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052. Here, the record establishes that counsel's investigation was too superficial to reveal the comparative strength of Raymond's and Deonta's support for the defense of mistaken identification, and to discover the powerful support that Dorothy Merrell could provide for the defense that Constantine was the third assailant.

In these circumstances, the district court properly found it inexplicable that only the boy with the weaker supporting testimony was called, rather than both, and properly found no apparent justification for failing to call Merrell. In other words, the presumption of sound trial strategy founders in this case on the rocks of ignorance, as in *Wiggins v. Smith*, 539 U.S. 510, 527-28, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

II.

The State further contends that the district court misapplied *Strickland*'s prejudice standard in concluding: "Ultimately, the Court is not confident in the jury's verdict and believes there is a reasonable *possibility* that the outcome would have been different had Deonta and Dorothy testified." *White v. Roper*, slip. op. at 16 (emphasis added). The State properly notes that the *Strickland* prejudice standard requires proof of a reasonable *probability* and argues that the difference in terminology is significant enough to constitute reversible error.

Initially, we note that the district court, just three pages earlier in its 46-page opinion, stated the correct "reasonable probability" standard three times and quoted the Supreme Court's summary of that standard. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527, quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The district court recognized *Strickland* as the governing authority and framed its analysis accordingly. The court focused on the ultimate *Strickland* prejudice inquiry when it concluded, taking into account the omitted testimony of Deonta Kinney and Dorothy Merrell, that it was "not confident in the jury's verdict." Thus, despite one mistake in the court's opinion, we are satisfied that it knew and correctly applied the familiar *Strickland* prejudice standard.

In resolving a similar issue in *Woodford v. Visciotti*, 537 U.S. 19, 23-24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002), the Supreme Court observed:

> The California Supreme Court's opinion painstakingly describes the *Strickland* standard. Its occasional shorthand reference to that standard by use of the term "probable" without the modifier may perhaps be imprecise, but if so it can no more be considered a repudiation of the standard than can this Court's own occasional indulgence in the same imprecision.

Although the district court in this case used the wrong word, rather than an imprecise shorthand, like the Supreme Court in *Woodford* we conclude that the district court's single mistake in articulating the *Strickland* prejudice standard was not a repudiation of that standard. Therefore, on this record, we affirm the court's conclusion that White is entitled to guilt phase habeas relief under *Strickland* because he proved that he was prejudiced by counsel's deficient performance.

The judgment of the district court is affirmed.

(Jul. 21, 2004)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	*
	*
Petitioner,	*
	*
v.	*
	*
DON ROPER,	*
Superintendent,	*
	*
Respondent.	*

ORDER GRANTING IN PART AND DENYING IN PART PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

It would be an understatement to describe the procedural history of this case as "lengthy." It has been considered by the Missouri Supreme Court on three occasions and by both this Court and the Eighth Circuit Court of Appeals on two occasions each. In its most recent decision, the Eighth Circuit remanded the case for consideration of the merits of all claims that the undersigned had previously held were procedurally defaulted. The claims Petitioner originally advanced now fall into four categories: (1) claims denied on the merits, the denial of which were affirmed on appeal; (2) claims denied on the merits which were not appealed because the Court declined to include them in the Certificate of Appealability; (3) claims denied on procedural grounds and require an evidentiary hearing to resolve; and (4) claims denied on procedural grounds which do not require an evidentiary hearing to resolve. An evidentiary hearing was held January 14 – 16, 2004, and at the Court's request the parties have submitted proposed findings of fact and

conclusions of law. After reviewing the record and considering the parties' arguments, the Court grants in part and denies in part the application for a Writ of Habeas Corpus.

I. BACKGROUND

The crime occurred in the early morning hours of January 6, 1987. The evidence supporting the verdicts was summarized by the Missouri Supreme Court as follows:

> Defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.
>
> The purpose of defendant's visit was to obtain "crack" cocaine. Wright had previously promised to get the cocaine and sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.
>
> According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut

> Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner, and Ford as their attackers.

State v. White, 813 S.W.2d 862, 863-64 (Mo. 1991) (en banc), cert. denied, 502 U.S. 1103 (1992) ("White I").

The primary evidence against Petitioner at trial was the testimony of Kinney and Black – the surviving victims of the attack. Early in her direct examination, Kinney testified that Petitioner was one of the three individuals who came to the house she shared with Wright, and that the other individuals were Roger Buckner and a man with the last name of "Ford." T.Tr. at 593.[2] She testified that she had been using crack cocaine daily for the past six months, T.Tr. at 595, and that she had been smoking crack the night of January 5 and the morning of January 6. T.Tr. at 596. She explained that she arrived at the house her brother (Ben Kinney, hereinafter "Ben") shared with his girlfriend and his girlfriend's mother at approximately 7:00 p.m. on the night of the fifth and, along with five or six other people, smoked crack. T.Tr. at 598-99, 601. Wright, Black, and Black's girlfriend were among the other people present. T.Tr. at 601-02.[3] At approximately midnight, Black drove Wright and Kinney, along with Kinney's sons, Black's girlfriend and Black's brother (Earl) to the house Wright and Kinney shared. T.Tr. at 603. She put her kids to bed, whereupon the adults resumed smoking crack. T.Tr. at 604. At Kinney's request, Black and Wright returned to her brother's

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[2]"T.Tr. at ____" is a reference to the trial transcript.

[3]Kinney's sons, Deonta and Raymond (ages eight and seven, respectively) were also there, but were in another room and not taking drugs. T.Tr. at 601.

house to try to get some money, but the effort failed. Later, Black and Wright took Black's girlfriend and Earl home, and later still returned to Ben's house to try to get some money. Approximately forty-five minutes after they came back from this latest trip somebody knocked at the back door by the kitchen. T.Tr. at 606-07. Kinney answered the door and encountered two men she did not know who were looking for Wright. T.Tr. at 608. While answering the door, she observed a blue van parked outside the house. T.Tr. at 632. Earlier, Wright had indicated he was expecting some visitors, and he admitted the men into the house. T.Tr. at 609. Kinney testified Petitioner was one of the two men to enter the house, T.Tr. at 610, and she noticed that he had a solid gold tooth on the right side of his mouth. T.Tr. at 612-13. She also indicated that Buckner looked familiar and thought he knew her brother. T.Tr. at 663-64.

The visitors and Wright began discussing a drug transaction. T.Tr. at 610. At some point during the conversation someone slammed open the back door and entered the house. T.Tr. at 614. Kinney recognized this third visitor as someone she had seen at a club several years ago but did not recall his name at that time. He told Kinney he was with Petitioner and Buckner. T.Tr. at 615. As Kinney returned to the front room and sat on the couch, Petitioner and Buckner drew their guns and Petitioner asked Wright "where the dope was." T.Tr. at 616. After Wright denied having any drugs, Petitioner began hitting him on the head with the gun and kicking him, and kept demanding to know where the drugs and money were. T.Tr. at 617-19. Eventually, Petitioner and Buckner began beating Black as well. T.Tr. at 620.

At one point, Petitioner told Buckner to get something with which to tie up Wright, and Buckner located an extension cord. They tied Wright's knees and hands together and continued questioning him. When Wright continued to deny having any

answers for his attackers. Petitioner took an extension cord and wrapped it around Wright's neck, choking him. T.Tr. at 621-22. When this failed to kill Wright, Buckner made Kinney get on the floor and used her belt
and some tape to tie her hands and legs. T.Tr. at 623. Petitioner declared that "[a]ll three of them die." T.Tr. at 624.

Buckner went into the kitchen and returned with a kitchen knife. Kinney saw Ford grab Wright's head and hold it back while Petitioner cut Wright's throat. T.Tr. at 626-27. Buckner then made Kinney go into a bedroom. After some debate, he then took the knife from Petitioner and cut Kinney's throat from behind. T.Tr. at 630.[4] The men left soon thereafter.

Kinney's sons contacted the police, and she was taken to the hospital for surgery. She subsequently spoke to the police and was shown five photographs and identified State's Exhibit 102 as a photograph of the man who cut her neck; the picture was of Roger Buckner. T.Tr. at 637-38. In March 1987, the police showed her some additional photographs and she identified State's Exhibit 112 as a photo of the third man who had come to her house (Ford). T.Tr. at 639. The following day, she picked Ford out of a lineup. T.Tr. at 641-43. Finally, in May 1997 she viewed a videotaped lineup (State's Exhibit 132) and identified Petitioner as one of the men at her house. T.Tr. at 644-45. She did not recall whether the police ever showed her photographs at any other time while she was in the hospital, nor did she recall how many other occasions the police came to the hospital to talk to her, but she did recall giving a videotaped statement at the police station. T.Tr. at 638. On cross-examination, she also disavowed any memory of identifying another individual who was never charged. T.Tr. at 650. There is no evidence that Petitioner's photograph was ever

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[4]Kinney was in a bedroom, so she didn't know who cut Black. Black had passed out before being cut, so he didn't know who cut him. T.Tr. at 874.

shown to Kinney prior to her picking him out of the videotaped lineup. Finally, prior to concluding her direct testimony, Kinney was shown three other photographs, one of which (State's Exhibit 121) was a photograph of Christopher (A.J.) Constantine; Kinney testified that none of the people in those three photographs were at her house that night. T.Tr. at 645-46.[5]

On cross-examination, Kinney was asked about her descriptions of the men. She testified that she told detectives Petitioner was "a black male in his late 20's, five-nine to five-ten, about 170 pounds" and that none of the thee men spoke with a Jamaican accent. T.Tr. at 658. She did not recall telling them that Petitioner had a gold tooth. T.Tr. at 658-59. Upon further questioning about the additional photos (including Constantine's), Kinney admitted that she knew Constantine to be a drug dealer and that she knew of someone named "A.J." but denied knowing him personally. T.Tr. at 679-80. She also denied telling either her brother or Black that Constantine was one of the men at her house. T.Tr. at 680-81. Petitioner's trial attorney also asked questions demonstrating Kinney's prior drug use. T.Tr. at 669-75.

Black also testified about his prior use of crack cocaine. T.Tr. at 841-42. His testimony about the events of the evening and early morning surrounding the attack substantially mirrors Kinney's testimony. He confirmed Kinney's testimony about a blue van outside her house. T.Tr. at 861-62. He knew Buckner and in fact had seen him earlier that evening when he and Wright had returned to Kinney's brother's house the first time. T.Tr. at 853. Buckner indicated he was looking for some crack and Wright indicated he could get him some and told him

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[5]The Index of Exhibits appearing at the front of the Trial Transcript (specifically, page XII) identifies State's Exhibit 121 as a "Photo of A.J. Christopher Constantine." See also T.Tr. at 897 (Petitioner's counsel describing State's Exhibit 121 as a picture of Constantine).

to come over to his house later. T.Tr. at 855-56. He recognized Buckner as the first person to enter Kinney's house but had never seen the second man before. He described the second man as "probably about five-nine, five-ten, probably about 160, and he had a beard, a full beard, and moustache and dark – well, not real dark skin. He was dark skinned." T.Tr. at 863. Unlike Kinney, he testified that the second man wore a green, red and white stocking cap. Compare T.Tr. at 661 with T.Tr. at 863. Upon viewing Petitioner at trial, Black testified that he looked like "the man that came in with [Roger] Buckner." T.Tr. at 890.

On cross-examination, Black denied knowing anyone by the name of A.J. Constantine or Christopher Constantine. T.Tr. at 895. Upon being shown State's Exhibit 121 (Constantine's picture), Black conceded that he had "some of the same characteristics" as the second man. T.Tr. at 896. He denied previously telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine as the second man. T.Tr. at 924, 932. Black was never explicitly asked if Constantine was the second man, but he insisted that Petitioner was the second man. T.Tr. at 953-56. He also denied that the second man spoke with an accent. T.Tr. at 938-39, 955.

Other witnesses linked Petitioner to Buckner, Ford and the crime; still other witnesses confirmed Kinney's and/or Black's identifications and rebutted defense counsel's attempt to cast doubt on the validity or consistency of those identifications. Officer Mark Hatcher arrested Buckner (pursuant to an arrest warrant) on April 11, 1987. Buckner was found hiding in a closet in his girlfriend's apartment. A search of the premises uncovered a wallet containing Petitioner's driver's license and social security card. T.Tr. at 713. Officer Carl Kegler confirmed that when Kinney saw the lineup with Petitioner in it she "immediately recognized him as one of the assailants that had been in the house that night she was stabbed and Mr. Wright was killed. . . ." T.Tr. at 720. Detective John Peterson

testified that he examined Petitioner for distinguishing characteristics shortly following his arrest and that at that time Petitioner had "one solid gold tooth and two open-faced tooths and one of them had three diamonds in it." T.Tr. at 729.

Detective Edward Glynn testified that on January 12, 1987, he went to the construction site where Buckner worked in an attempt to find Buckner when he picked up his paycheck. T.Tr. at 740-41. By the time he arrived, Buckner's check had been picked up by someone in a black Cadillac. The Cadillac's trek away from the site was observed by a police helicopter unit, and Detective Glynn was thus directed to a residence in Independence, Missouri. Upon arriving, he found the black Cadillac parked outside. Petitioner was inside the residence. T.Tr. at 741-43. Petitioner voluntarily went to the police station with Detective Glynn, where he was briefly interviewed (by someone other than Detective Glynn) and photographed (by Detective Glynn). T.Tr. at 742-43.[6] Detective Glynn explained that Petitioner was not a suspect at that time, but was asked to go downtown because it appeared that he had picked up Buckner's check and it was unknown what part, if any, he played in the murders. T.Tr. at 745, 747.

Detective Clarence Gibson visited Kinney at the hospital the day of and the day after the attacks. She identified Buckner out of a photo array but failed to pick Constantine's picture out of a different array. T.Tr. at 752-54. Detective Gibson also testified that he interviewed Petitioner when Detective Glynn brought him to the station. Petitioner told him he had loaned the Cadillac to an acquaintance named Larry Thomas (whose address he did not know) for the purpose of picking up

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[6]Detective Glynn had no knowledge as to whether Petitioner's photograph was shown to Kinney when she was interviewed the next day. T.Tr. at 747. Other witnesses denied that this occurred, and nobody testified to the contrary. The photograph taken by Detective Glynn was State's Exhibit 117. T.Tr. at 750.

Buckner's check. Petitioner admitted knowing who Buckner was and that Buckner was "on the run" but denied knowing where he was hiding. T.Tr. at 755-56.

Detective Gibson confirmed that he talked to Kinney after he interviewed Petitioner, and she told him the man who entered with Buckner had a gold tooth. T.Tr. at 757.[7] He testified that he showed Kinney another photo array on January 18, 1987 that did not include a picture of either Buckner, White or Ford, and Kinney failed to positively identify anyone in that array. T.Tr. at 758. He showed her an array on March 15, 1987, and she identified anyone Ford as the third man. Up to this point in time, Detective Gibson had not shown Kinney Petitioner's picture, T.Tr. at 757, 759, 782-83 -- in fact, up to this point in time he did not even know that the police *had* Petitioner's picture. T.Tr. at 771-72.

One of Buckner's co-workers (Earl Wells) testified that he lived across the street from Buckner, regularly rode to work with him, and often saw Petitioner at Buckner's house. T.Tr. at 958-60, 965. Buckner owned a white Plymouth or Pontiac, but the last time they rode together Buckner drove a black Cadillac that he had seen Petitioner driving in the past. T.Tr. at 960-61. On the night of January 5,[8] he saw Petitioner drive Buckner's white car to Buckner's house and knock on the door. T.Tr. at 968-70. Eventually, Petitioner got back in Buckner's car and drove off; Buckner went back into his house. T.Tr. at 970. Later, Buckner drove off in the black Cadillac. T.Tr. at 971.

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[7]Kinney's statement was videotaped. T.Tr. at 757.

[8]Although Wells could not testify as to the precise date, the date can be deduced based on Wells' other testimony from James Brown (Wells' and Buckner's employer) and Officer Carl Kegler (who went to the construction site and talked to Wells).

Detective Lee Floyd testified that he interviewed Kinney's sons. He showed Raymond (the younger child) a photo array that included pictures of Buckner and Constantine, but the boy did not identify anyone in the array. T.Tr. at 988-89. Deonta viewed the same array and indicated that he recognized Constantine, although Detective Floyd testified that Deonta did not actually identify Constantine as being there that night. T.Tr. at 989-90.

Raymond was one of Petitioner's two witnesses in the guilt phase; at the time he was ten years old. He testified that one of the men that visited his house that night "talk[ed] funny." When asked what kind of voice he understood that to be, Raymond said it was a "Jamaican accent." T.Tr. at 999. He also testified that he had a chance to see that man's face, and Petitioner was not the man who spoke with a Jamaican accent. T.Tr. at 999-1000. However, when a series of photographs (including State's Exhibit 121, Constantine's photo), Raymond denied that any of them looked familiar. T.Tr. at 1000-01. Deonta did not testify.

II. DISCUSSION

The Court will address all of the issues Petitioner has raised, regardless of whether or how they have been previously rejected. This will insure that the disposition of all of Petitioner's claims is documented in one place and avoid confusion about the basis for the Court's rulings on the various issues.

A. Ineffective Assistance of Trial Counsel: Voir Dire, Part I

This claim attacked the manner in which counsel conducted voir dire. The Court previously denied relief on this claim, and the Eighth Circuit affirmed in the second appeal. White v.

Luebbers, 307 F.3d 722, 727-29 (8th Cir. 2002), cert. denied, 538 U.S. 981 (2004).

B. Informing Jurors About the Governor's Power to Pardon

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, White v. Bowersox, 206 F.3d 776, 783 (8th Cir.), cert. denied, 531 U.S. 917 (2000), and the Eighth Circuit's second opinion does not require reconsideration of those claims. Accordingly, this claim is rejected.

C. Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection

This argument alleges that counsel was ineffective for failing to raise the objection discussed in the preceding section. This claims was rejected on the merits in the Court's first order, wherein the Court observed that the objection in question was not meritorious so counsel could not be ineffective for failing to assert it. This is merit-based determination that the Eighth Circuit did not require to be re-examined.

D. Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror Ruth Tuggle

The claim was previously denied on the merits, and the Eighth Circuit affirmed. White v. Luebbers, 307 F.3d at 729-30.

E. Denial of Right to Fair and Impartial Jury

This claim alleged that Petitioner's right to a fair and impartial jury was denied because Juror Tuggle was not removed. This claim was denied on the merits, and the Eighth Circuit's discussion of the preceding issue affirms this Court's ruling.

F. Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause

This claim was previously denied on the merits, and the Eighth Circuit affirmed in the first appeal. White v. Bowersox, 206 F.3d at 782.

G. Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror

During the small-group voir dire, Venirewoman Brison (who was number 33 on the panel) discussed her concerns and hesitations about voting in favor of the death penalty. T.Tr. at 276-77, 284. The prosecutor's motion to strike her for cause was denied. T.Tr. at 298-91. Petitioner contends that the prosecutor "slipped" her onto a list of jurors who had been removed for cause, and counsel's failure to remedy this error constituted ineffective assistance of counsel. In its two previous Orders, the Court denied this claim because it was procedurally defaulted and on the merits. Arguably, the discussion of the merits was dicta, so in an abundance of caution the Court will set forth its ruling on this issue.

The relevant portion of the transcript reflects the following discussion:

Prosecutor #1: Judge, we have enough, if we want to save a bunch of time, I think both parties would agree we could excuse – I think there were eleven, is that right?

Prosecutor #2: Eleven people on sequestration.

Prosecutor #1: That should take us down to 40 [venirepersons].

The Court: Well, if we're going to do that by agreement, I have no objection to that. So if I have the right list, that's [venirepersons] 23, 25, 27, 20, 46, 33, 69, 45, 73, 90 and 92.

Prosecutor #1: That's what our numbers show.

Prosecutor #2: I think it's 42, Judge.

The Court: That's what I started to question. That looks more like a 4 than it does a 9. Yes. Carder. I had the name down. 42. Well, I'm not going to do that unless it's by agreement.

Defense Counsel: I'm just checking, Judge. I'll agree to it.

The Court: Do you understand, Mr. White?

Defendant: [nods head]

The Court: You have no objection to it?

Defendant: No, sir.

T.Tr. at 493-94. This discussion demonstrates that this list was not offered as a list of potential jurors that had been struck for cause; it was a list of jurors the two sides mutually agreed could be struck because of their answers regarding sequestration. The Court made clear that absent the agreement, these jurors would not be struck. (Interestingly, the fact that Defendant's trial

counsel made the agreement was itself offered as a ground for relief in the Second Amended 29.15 Motion. See L.F. at 28.).[9] *Nobody* on this list was struck for cause. See T.Tr. at 245-50, 273-74, 291-92, 307, 321, 340-41, 365, 384, 389, 401, 413-14, 434, 444 (portions of transcript referencing jurors who were stuck for cause).

H. Ineffective Assistance of Trial Counsel: Voir Dire, Part II

This argument is closely related to the one addressed in Section II(A), and as noted in that discussion it was affirmed in the second appeal.

I. Ineffective Assistance of Counsel: Failure to Investigate and Introduce Evidence of Innocence

Throughout these proceedings, Petitioner has posited that he has been mistakenly identified and that Constantine was actually the person who entered Wright's house with Buckner and participated in the murder. Constantine, a native of Jamaica, was convicted in 1989 of conspiring to distribute narcotics. Petitioner has alleged a myriad of means by which this theory could have been proven, but not all of these means were presented at the January hearing. These avenues[10] cannot

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[9]Separate Legal Files (indicated by "L.F. at ____") were created each time this case was remanded to the state trial court. The Court's references to the Legal File will be to the one bearing Number 78459, which appears as Respondent's Exhibit BB in this Court's file.

[10]The Court will offer two examples. Counsel's failure to interview Constantine cannot be evaluated because Constantine's testimony was not procured for the hearing. Counsel's failure to present testimony from Joyce Williams (Petitioner's sister) cannot be evaluated because, while her affidavit was submitted, she did not testify at the hearing. See Section II(Q), infra.

be considered because there is no record as to the evidence that could have been obtained. The Court will address only those avenues of investigation that were presented at the hearing or are properly in the record.

This argument is presented as a claim of ineffective assistance of counsel, which is governed by the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). "This standard requires [Petitioner] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense." Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995) cert. denied, 517 U.S. 1214 (1996) (quoting Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Id. at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's unprofessional errors, the result of the proceeding would have been different.'" Lawrence, 961 F.2d at 115 (quoting Strickland, 466 U.S. at 694).

Id. Failure to satisfy both prongs is fatal to the claim. Pryor v. Norris, 103 F.3d 710, 713 (8th Cir. 1997) (stating there is no

need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness"). "[T]o establish prejudice, a 'defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Wiggins v. Smith, 123 S. Ct. 2527, 2542 (2003) (quoting Strickland, 466 U.S. at 694). Assessing prejudice requires the Court to reweigh the evidence of guilt against the totality of evidence, including evidence that would have been introduced but for violations of Strickland's performance prong. See Siers v. Weber, 259 F.3d 969, 974 (8th Cir. 2001), cert. denied, 534 U.S. 1138 (2002) (citing Strickland, 466 U.S. at 695).

Some of the issues raised under this heading justify issuing the writ, while others do not. The Court will address these categories separately.

1. Issues Justifying Issuance of the Writ

Robert Duncan (who passed away in 1996) was lead counsel, and two to three weeks before trial he asked John O'Connor to second chair the trial. Hrg. Tr. At 60-61; Hrg. Tr. At 70, 82-83.[11] O'Connor originally was not expected to do anything more than take notes, but his role expanded over time. Hrg. Tr. At 71. Duncan did not utilize procedures for deposing witnesses, did not informally interview the witnesses, and until O'Connor became involved Duncan did not even have copies of the depositions taken in connection with Buckner's trial. Hrg. Tr. at 24, 74, 84. The State treated the case as an "open file," meaning the copies of all police reports are made and provided to defense counsel, Hrg. Tr. at 22, and opportunities

[11]"Hrg. Tr. At ____" is a reference to the transcript of the hearing held before this Court in January 2004.

to view and obtain copies of photographs videotapes were provided. Hrg. Tr. at 34. Duncan did not obtain copies of the photographs and videotapes used in the investigation. although he may have viewed them in the prosecutor's office. Hrg. Tr. at 78. Duncan obtained and viewed the police reports before O'Connor became involved in the case. Hrg. at 85. 89. Counsel did not attend Buckner's trial and the record is silent as to whether counsel had a transcript of the trial because the question was never asked. See Hrg. Tr. at 77, 85-87.

Kinney's sons, Deonta and Raymond, testified in Buckner's trial. and Deonta identified Constantine as one of the men present. Both boys were also deposed prior to Buckner's trial. Raymond testified that he awoke upon hearing a loud noise, woke his brother, and saw three men in the front room that were not present when the boys went to sleep. Buckner Tr. at 743.[12] He identified one of the men as a person he knew to be "A.J." and said he spoke with a Jamaican accent. Buckner Tr. at 746-48. Deonta testified that he saw "A.J." sleeping at his uncle's house; he had never seen him before but his uncle (Ben) told him the man's name. Buckner Tr. at 788. Deonta later confirmed that the assailants (including "A.J.") had been at his uncle's house earlier that evening. Buckner Tr. at 794. Two of the men tied up the boys but neither was the "chubby" man described as "A.J." Buckner Tr. at 797-98. "A.J." later came to the bedroom to quiet the boys, but when Deonta started to cry he hit the child on the head four times. Buckner Tr. at 798-99. Deonta identified State's Exhibit 121 – a picture of Constantine – as a picture of "A.J.," Buckner Tr. at 799, but Raymond failed to identify the same picture. Buckner Tr. at 778. Deonta also testified that "A.J." spoke with a Jamaican accent. In their depositions, Raymond identified the "chubby" man as having the name "A.J. or Ajax, one of those" and Deonta testified about the "chubby" man, saying "I think his name was A.J."

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[12] "Buckner Tr. at ____" is a reference to the transcript of Buckner's trial.

The police report indicated that Deonta had identified Constantine from a photo array and identified him as "A.J."

As noted, Raymond testified at Petitioner's trial. Consistent with his earlier testimony, Raymond failed to identify Constantine as a person who was present at the murder scene, but he was not asked if he knew the "chubby" man to be "A.J." as he had testified in his deposition. More inexplicably, Deonta did not testify. The Court cannot comprehend why, of the two brothers, counsel opted to call the one who had never identified Constantine's photo when (1) the theory of defense was that Petitioner was being mistakenly identified in Constantine's stead and (2) the other brother had consistently identified Constantine. There was no harm in calling Raymond, as he would have been able to confirm much of Deonta's testimony; the problem is the failure to call Deonta. Raymond's testimony was of little value without Deonta's testimony. More importantly, Deonta's testimony directly implicated Constantine and exculpated Petitioner. Deonta's identify was known to counsel, a reasonable investigation would have revealed his identification of Constantine as the man who entered with Buckner, and no plausible explanation has been offered as to why Deonta could not or should not have been called.

Coupled with this failure is the failure to call Dorothy Merrell ("Dorothy") to testify. Gwen Merrell was Ben's girlfriend; Dorothy was Gwen's mother and she lived with Ben, Gwen and Gwen's children. Crack was sold from the house by both Ben and Dorothy. During her testimony,[13] Dorothy identified Constantine's picture as a person she knew as a Jamaican drug dealer who went by the name of "Jay" or "A.J." She considered him dangerous because he had threatened to kill Kinney's brother when he had used some of "A.J.'s" drugs

[13]Dorothy's testimony was submitted at the January 2004 by way of deposition; the Court has reviewed both the transcript and the videotape of that deposition.

instead of selling them. She further testified that Buckner and "A.J." came to the house looking for drugs on January 5 when Kinney and Wright were present; Wright told the men that he had drugs at his house and they could come over later to get some. Buckner and "A.J." left the house shortly after Kinney and Wright, declaring that they were going to get some drugs. Dorothy also testified that she had never seen Petitioner at her house. While Dorothy's testimony conflicts with Kinney's and Black's in certain key respects, this is of no consequence; it is no surprise that a criminal defendant might present evidence that conflicts with the prosecution's evidence. The Court's concern is the lack of justification for failing to call Dorothy. Her testimony places Buckner and Constantine together shortly before the crime, and describes circumstances that led to Buckner's and Constantine's departure to Wright's house. Dorothy's potential for having information was known to counsel, because there was information in the police reports establishing that she was home on January 5 and 6.

The failure to call these witnesses to the stand violated the performance prong. Having adopted a theory of mistaken identification, and having suggested to the jury that a particular person was the real culprit, the failure to call witnesses who could directly support that theory fell below the range of professional competence. Presenting this testimony may have changed the outcome, so the failure to call these witnesses also prejudiced Petitioner's defense. None of these witnesses or potential witnesses are overwhelmingly compelling. The State's witnesses were under the influence of crack and have provided slightly contradictory descriptions of the events and the assailants. Deonta was a young child, which may be a negative factor in his credibility. In addition, of the four eyewitnesses (including Raymond), only Deonta identified Constantine as the man with Buckner. Dorothy was not an eyewitness to the crime, and her credibility may be suspect given that she was a crack dealer. There is evidence connecting

Buckner and Petitioner, but Dorothy's testimony also connected Buckner and Constantine. Ultimately, the Court is not confident in the jury's verdict and believes there is a reasonably possibility that the outcome would have been different had Deonta and Dorothy testified.

2. Issues That Do Not Justify Issuance of the Writ

Petitioner contends his attorney should have elicited testimony from Frank Johnson. Johnson testified that he knew Petitioner because he was incarcerated with him in 1987 or 1988. Hrg. Tr. at 153-54; 169. He also knows of other members of Petitioner's family. Hrg. Tr. at 155-58; 162-65. He identified and confirmed the statements in his previously-prepared affidavit in which he averred that shortly after the time of Don Wright's murder he was riding on a Metropolitan Transportation Service van and overheard a woman who identified herself as Carol Kinney talking to the driver. The woman and the driver appeared to be friends. She told the driver that "a Jamaican named A.J. had broken into her house and killed her boyfriend." Later, while incarcerated in the Jackson County jail, Johnson "ran into" Petitioner and, after talking with him, realized the importance of the woman's statement. However, there is no evidence that Johnson knew Kinney, or that the speaker actually was Kinney. The Court is empowered to make a credibility finding, and finds Johnson's testimony to be implausible – and that is before one considers the unusual circumstance of Johnson's visit to the workplace of other witnesses involved in this case, Hrg. Tr. at 143-44, which the Court credits despite Johnson's denials. Finally, separate and apart from these issues, Petitioner offers no explanation as to how his attorneys should have known that Johnson had "information" relevant to this case. The Court concludes that the failure to discover this "witness" did not violate Strickland's performance prong, and the testimony would have been so

useless and incredible that its absence did not result in prejudice.

Charles Ross was an investigator for Buckner's attorneys. He interviewed Black, and in his affidavit Ross declares that Black told him Kinney said one of the three men involved in the murder went by the street name of "A.J." Ross did not testify at the January hearing. The Court cannot accept Ross' affidavit as evidence of what Black would say because the affidavit itself is hearsay, and its description of Black's statements constitutes another level of hearsay. It might reasonably be contended that the affidavit should have caused Petitioner's counsel to pursue the matter with Black, but at trial Black was specifically asked whether he remembered "Carol telling you at the hospital that one of the men was "A.J." and he denied that this happened. T.Tr. at 924. Later, counsel discussed Ross' investigative report with Black, and he again denied saying Kinney told him one of the men was A.J. T.Tr. at 930-32.[14] Counsel was precluded from using Ross's report to impeach Black because the statement was not prepared or adopted by Black. Ultimately, there is no violation of either of Strickland's prongs.

Petitioner submitted a deposition of Gwen Merrill in lieu of her live testimony at the January 2004 hearing. She could testify generally to a connection between Buckner and Constantine, but had no information about the day in question. She could also testify that she had never see Buckner with Petitioner, but she did not testify that she was in the house on January 5 or 6 at the times Petitioner was allegedly there so the testimony is of questionable value. Gwen's testimony lends a modicum of support to both her mother's testimony and Petitioner's theory in establishing a connection between Buckner and Constantine, and there would have been no harm in presenting it; however, standing alone it is not particularly

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[14]Kinney also denied making the statement. T.Tr. at 681.

strong evidence and the Court concludes the failure to present it did not prejudice Petitioner's defense.

Petitioner contends that Black's brother, Earl, should have been called to testify that he did not know Petitioner, but that he did know Constantine. The reasoning is based on a theory that the person with Buckner acknowledged Black as Earl's brother, but this is far from clear. Kinney testified that Buckner told the man with him that Black was Earl's brother, and his companion responded by saying "Oh, yeah? Get in here and lay down on the floor." T.Tr. at 620. Kinney provided virtually identical information to the police in an interview following the attacks. This statement is too vague to qualify as proof that the second person knew the men were brothers, much less proof that Earl knew the second person."[15] The Court concludes there was no prejudice from counsel's failure to elicit this testimony from Earl.

Finally, Petitioner contends Duncan's failure to take depositions prior to trial constituted ineffective assistance. The Court declines to rule that failure to depose witnesses in a criminal case is *per se* ineffective assistance. The Court acknowledges that most attorneys believe it best to conduct depositions, particularly in a case that hinges upon eyewitness identification. This does not mean, however, that the Constitution requires it to be done. Duncan chose, for strategic reasons, not to take depositions because he did not want to alert witnesses and prosecutors to his questions. Hrg. Tr. at 75. Depositions are largely an investigatory tool, and for Strickland purposes, the failure to take one should be viewed in concert with whatever other steps were taken to investigate the case. Assuming a constitutionally adequate investigation, the decision whether to take a deposition to "lock in" testimony or to eschew

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[15]Petitioner also points to a statement from Black's deposition in Buckner's case, but the statement only establishes that Buckner knew the men were brothers.

the opportunity to avoid alerting others to counsel's thoughts and tactics becomes a question of strategy that is unreviewable under Strickland.

Nothing said in this Order should be construed as determining that these items of evidence should not be pursued in the event this case is retried. The Court simply holds the failure to present these items did not violate the constitutional guarantee of effective assistance of counsel.

J. Ineffective Assistance of Counsel: Failure to Present Mitigating Evidence

Counsel presented no evidence during the penalty phase. This was due to a complete lack of planning: Duncan was so confident the jury would acquit that he never developed a plan for the penalty phase of the trial. Hrg. Tr. at 93-94, 117-18; see also Hrg. Tr. at 79-80, 98, 114. The failure to plan for such a critical phase of the proceedings cannot be justified and clearly violates the performance prong; constitutionally competent counsel does not fail to develop a plan for the penalty phase of a capital trial.

The Court finds ample evidence existed that could have been presented on Petitioner's behalf in the penalty phase of Mr. White's trial. Olen Barber, the supervisor of the Arapahoe County Jail, testified that Petitioner was helpful in diffusing tensions resulting from an overcrowding problem. He praised Petitioner's involvement in a program called ACAP, Arapahoe County Awareness Program. Petitioner demonstrated strong leadership, assisted inmates with problems, and was very beneficial to the jail staff. Among Barber's duties was the preparation of adjustment and conduct reports for the court, and he rated Petitioner as "excellent." Barber also sent a letter to the judge in Petitioner's case. This was a rare occurrence, but

he considered Petitioner's work to be "above and beyond normal behavior." In his letter he wrote:

> I would like to report that [Petitioner] has continued to maintain excellent demeanor. He has contributed many hours assisting the jail staff with problem inmates.
>
> [Petitioner] has used his leadership abilities very effectively to keep the tension levels down during the overcrowded conditions of the jail during the past year. And I have no means by which to estimate the number of inmates that he has helped during his stay here, but I have received several letters from inmates expressing their appreciation for his help.

Petitioner was also instrumental in the establishment of a drug and alcohol rehabilitation program at the jail.

Bret Dillingham, a licensed clinical social worker, did an extensive study of Petitioner's life history, called a psychosocial history. Dillingham testified that Petitioner's home environment contained "risk factors" that elevated his risk for "bad outcomes" in adolescence and adulthood; his family was impoverished, his father suffered from alcoholism and was abusive to Petitioner, Petitioner's mother and Petitioner's siblings, and there was a family history of criminal activity and substance abuse.

Members of Petitioner's family testified at the January 2004 hearing: Mildred Patterson, Petitioner's aunt; Kareem and Doug Williams, his nephews; Lucille Duncan, his sister; and Amelia (Mia) Duncan, his niece. These family members

supported Dillingham's psychosocial history and findings. They also testified about Petitioner's importance in their lives.

Respondent dismisses this potential evidence, characterizing it as "not impartial" and criticizing the absence of any evidence minimizing, rebutting, or addressing Wright's murder or demonstrating any remorse on Petitioner's part. Respondent also characterizes Dillingham's testimony as being subject to cross-examination. These observations are largely correct, but they do not demonstrate an absence of prejudice. To credit Respondent's position would be tantamount to declaring that there was a certain category of evidence Petitioner was required to present in order to avoid the death penalty, or that the jury was obligated to impose the death penalty, but neither proposition is true. Petitioner was permitted to present, and if presented the jury was obligated to consider, any relevant evidence bearing on the suitable punishment. E.g., Sumner v. Schuman, 483 U.S. 66, 75-76 (1987). A jury is never required to impose the death penalty; it may be persuaded by mercy, compassion, residual doubt, or a host of other factors in determining whether a murderer should be sentenced to death, and the State cannot preclude a jury from considering information regarding those factors. The need for individualized sentencing, as well as the concept of mercy and compassion at the sentencing phase, are well-established in Supreme Court precedent.

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated

> offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Monge v. California, 524 U.S. 721, 734 (1998); Clemons v. Mississippi, 494 U.S. 738, 748 (1990); Lockett v. Ohio, 438, U.S. 586, 604-05 (1978).

Nobody can predict what the jury would have decided if it had been presented with the information described above. The jurors may have still voted in favor of the death penalty. On the other hand, there is a reasonable possibility that at least one juror, motivated by compassion or mercy, would have voted for life imprisonment. Death is not an automatic or required sentence, and appeals to compassion, mercy and conscience are sometimes sufficient to sway the outcome. The complete absence of any evidence at the penalty phase deprives the Court of any confidence in the outcome, and there is a reasonable possibility that a different decision would have been rendered but for counsel's performance. Cf. Wiggins, 123 S. Ct. at 2542-44.

K. Eighth Amendment Violation Due to Lack of Mitigating Experience

In an argument related to the preceding section, Petitioner argues counsel's failure to present mitigating evidence violated his rights under the Eighth Amendment (as opposed to the Sixth Amendment as was discussed in Section II.J). The Court rejected this claim in its first Order due to the procedural bar and because the claim is barred by the non-retroactivity rule from Teague v. Lane, 489 U.S. 288, 316 (1989). The Court adheres to the latter ruling, and further observes that counsel was not barred from presenting mitigating evidence; he simply

chose not to do so: in that context, the Court does not see how the Eighth Amendment provides Petitioner any greater protection than his Sixth Amendment right to effective assistance of counsel.

L. Trial Counsel's Conflict of Interest

This claim was previously denied on the merits, and the Eighth Circuit affirmed this decision. White v. Bowersox, 206 F.3d at 782-83.

M. Ineffective Assistance of Counsel on Postconviction Issues

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits. Even if the claim is not moot, it has been rejected in other cases. E.g., Coleman v. Thompson, 501 U.S. 722 (1991); Lowe-Bey v. Groose, 28 F.3d 816 (8th Cir.), cert. denied, 513 U.S. 1061 (1994).

N. Abandonment By Postconviction Counsel

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits.

O. Due Process: Pleading Requirements

This issue, which addressed the pleading requirements in Missouri's postconviction proceedings, is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits.

P. Due Process: Rule 29.15 Deadlines

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits.

Q. Ineffective Assistance of Counsel: Failure to Interview Joyce Williams

Petitioner's sister (Joyce Williams) provided an affidavit averring that she went to work at approximately 5:00 p.m. on January 5, 1987, and left Petitioner at her house to watch her children. She returned home sometime between 2:00 and 4:00 a.m. the next day, and Petitioner was asleep on a bed. She went to sleep around 8:00 a.m., and Petitioner was still sleeping.

Unfortunately, Williams has not testified at any hearing, including the January 2004 hearing. This precludes any opportunity for the Court to judge the value of her testimony. In addition, Williams' affidavit indicates that Petitioner told her he would talk to Duncan and arrange for him to talk to her, but Duncan did not talk to her until after the trial started. There is no evidence as to when Petitioner told Duncan that his sister would be able to provide an alibi, nor is there any indication as to why Williams was not called to testify. Accordingly, the Court cannot grant relief on this issue.

R. Ineffective Assistance of Counsel: Failure to Deliver Opening Statement

Until now, Petitioner has consistently described this issue as counsel's failure to provide an opening statement. This is not an accurate description. Duncan reserved opening statement, T.Tr. at 530, and O'Connor delivered an opening statement at the end of the State's case and before presenting

evidence. T.Tr. at 996-98. Admittedly, the statement was short – but Petitioner has not previously raised an issue about it content or length. Petitioner has also not previously raised an issue about the timing of the statement – which is just as well, as the decision whether to deliver an opening statement before or after the State's case is a classic strategy decision. Petitioner's latest contentions regarding the timing and content of the opening statement are not raised in the First Amended Petition and are not before the Court.

S. Ineffective Assistance of Counsel: Failure to Hire an Expert

Petitioner contends his trial counsel was ineffective for failing to hire an expert to testify that those who use crack cocaine – such as Kinney and Black – suffer damage to their ability to perceive and remember events. Dr. Lee Evans, a psychiatric pharmacist, testified at the January 2004 hearing. He described cocaine's effect on the human body. He reviewed transcripts of Kinney's and Black's testimony at Buckner's trial, Petitioner's trial, and in depositions. He concluded that Kinney's memory of details was "impacted" by her use of crack. Hrg. Tr. 193. He based this conclusion on her admission to extensive crack use and the presence of a multitude of inconsistencies in her statements. Hrg. Tr. at 193-97.

The Court is not persuaded that an expert's testimony would have been particularly helpful at trial or that the failure to retain an expert constituted a violation of the performance prong. Dr. Evans essentially took facts already known to the jury and linked them together in a casual relationship. The jury knew that Kinney was a chronic abuser of crack, and the jury was aware of the inconsistencies in her descriptions of events. Dr. Evans could have told the jury that the inconsistencies were caused by her use of crack, but this information was not terribly important. The important information was not the cause of

those inconsistencies but rather that they existed in the first place. Knowing that the inconsistencies were caused by crack abuse would not have increased their significance.

T. Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances

Petitioner contends that the prosecutor gave insufficient notice of its intent to submit the aggravating circumstances reflected in Instructions 13 and 14 to the jury. He also contends that two of the instructions were vague. The first permitted the jury to find an aggravating circumstance because Petitioner and his cohorts purposely left gas stove's burners on and blew out the pilot light, thereby "created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. . . ." The second allegedly vague instruction asked the jury to consider whether Wright's murder "involved torture, and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman."

Petitioner cannot satisfy Strickland's prejudice prong because Missouri is a "nonweighing" state, meaning that "a finding of at least one aggravating circumstance is a threshold requirement to imposing a death sentence." Sloan, 54 F.3d 1371, 1386 (8th Cir. 1995), cert. denied, 116 S. Ct. 728 (1996). As long as the jury validly found at least one aggravating circumstance, an improper instruction is of no consequence. Here, the jury found additional statutory aggravating factors (e.g., that Petitioner had prior felony convictions, that the murder was committed while other crimes (other attempted murders) were being committed, and that the murder was committed in connection with a robbery). Direct Appeal Legal File at 17-18. assuming an uncured unconstitutional vagueness in the instructions, "[t]he jury's penalty phase verdict is. .

.reliable despite the unconstitutionally vague instruction on the other aggravating factor, and the use of that instruction was harmless." Id.; see also Buchanan v. Angelone, 522 U.S. 269, 272-77 (1998); Ramsey v. Bowersox, 149 F.3d 749, 757 (8th Cir. 1998), cert. denied, 525 U.S. 1166 (1999); Bolder v. Armontrout, 921 F.2d 1359, 1367 (8th Cir. 1990), cert. denied, 502 U.S. 850 (1991).

U. Ineffective Assistance of Trial Counsel: Failure to Object to the Videotaped Lineup

Petitioner contends that when Petitioner was placed in a videotaped lineup on May 26, 1987, he was in jail awaiting trial on an unrelated robbery charge. He alleges that his attorney in the robbery case was not contacted prior to the lineup, and his trial counsel in this case was ineffective for failing to object to the use of the lineup for this reason. The Supreme Court has held that "a pretrial corporeal identification conducted after a suspect has been indicted is a critical state in a criminal prosecution at which the Sixth Amendment entitles the accused to the presence of counsel." Moore v. Illinois, 434 U.S. 220, 224 (1977). However, this right was not implicated here because the lineup was on videotape.

> In United States v. Ash, 413 U.S. 300, (1973), the Court held that the Sixth Amendment does not require that defense counsel be present when a witness views police or prosecution photographic arrays. A photographic showing, unlike a corporeal identification, is not a 'trial-like adversary confrontation' between an accused and agents of the government; hence, 'no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.' Id. at 317.

Id. at 227.

V. Ineffective Assistance of Counsel:
Failure to Impeach Detective Gibson

Petitioner contends his trial attorney was ineffective for failing to impeach Detective Gibson with evidence that he had committed "improper actions" in prior cases. This claim is raised specifically with regard to Detective Gibson's denial that he took Petitioner's picture. The Court rejects this claim for several reasons. First, it is doubtful that Detective Gibson could be impeached in this manner. Second, Detective Glynn admitted to taking Petitioner's photograph. Third, the prejudice to Petitioner is completely absent. There is no denying that a photograph was taken, nor is there any indication that Detective Glynn lied when he said that he took the picture, and Petitioner has not really explained why it mattered who took the picture.

It may be that Petitioner is trying to suggest that Detective Gibson took a picture and showed it to Kinney outside the context of a proper lineup, or showed her the picture Detective Glynn took. The problem is there is no evidence that this ever happened, see Part II(SS)(2), infra, so Petitioner is simply speculating. Petitioner cannot speculate that an event might have happened, then impeach denials of those events.

W. Ineffective Assistance of Trial Counsel:
Failure to Object to Prosecutor's Use of
Peremptory Challenges and Certain Strikes for Cause

Petitioner contends that the prosecutor utilized peremptory challenges to eliminate five jurors who had "conscientious scruples" against the death penalty and six jurors who expressed difficulty believing witnesses who used illegal drugs. He also

claims that his trial counsel failed to object to two of the prosecutor's requests to strike jurors for cause.

The first aspect of this claims is not cognizable because it would require a new rule of criminal procedure, and new rules may not be announced (absent circumstances not present here) in a habeas proceeding. Teague v. Lane, 489 U.S. 288, 316 (1989). The use of strikes in this manner is not barred by Batson v. Kentucky, 476 U.S. 79 (1986), and Petitioner would require a new constitutional rule in order to demonstrate that he was prejudiced by the failure to object. The Court cannot find prejudice absent a rule prohibiting the prosecutor's use of strikes for these reasons, and it cannot create the rule in light of Teague.

The second aspect is clearly lacking in merit. Venireman Heman agreed that he did not know if he "could be fair to both the State and the defendant" because of his views regarding drugs. T.Tr. at 333. There is no indication as to what counsel should have done, and agreeing to strike Mr. Heman for cause was reasonable given that the murder was related to a drug transaction and the jurors would be assessing the penalty if Petitioner was found guilty. In addition to her views about drugs, Venirewoman Meysenburg declared that she did "not take stress very well" and was suffering from a migraine headache after just one day of the jury selection process. Tr. at 370-71. She also revealed that she would "probably" vote automatically for life without parole if Defendant were found guilty. Tr. at 369. It is not clear whether the basis for the strike for cause was Ms. Meysenburg's views regarding drugs, her inability to consider the death penalty, or her health, Tr. at 384; regardless, the record reveals that the strike for cause was appropriate so failing to object was not ineffective assistance.

X. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Closing Argument

During Penalty Phase

The claim was previously denied on the merits, and the Eighth Circuit affirmed this decision. White v. Luebbers, 307 F.3d at 730.

Y. Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver

During cross-examination, Petitioner's trial counsel asked Detective Gibson whether he read Petitioner his rights prior to interviewing him. He also established that Petitioner was willing to talk with Detective Gibson and did not ask for a lawyer. T.Tr. at 775-76. On redirect, the prosecutor asked whether Detective Gibson had asked Petitioner to sign a waiver of his Miranda rights; Detective Gibson said that he had. T.Tr. at 784. Petitioner's trial counsel then approached the bench to object; after the trial court forced him to assert a ground for his objection, he declared "it's irrelevant, it's immaterial, and the fact he signed a consent form has nothing to do with it because he talked to them." T.Tr. at 785. This objection was overruled. Upon resumption of the redirect examination, Detective Gibson reaffirmed that he had asked Petitioner to sign a waiver form and he refused to do so. T.Tr. at 786.

Petitioner contends his appellate counsel was ineffective for failing to challenge the testimony on the grounds that it constituted an infringement on Petitioner's constitutional right to remain silent. The problem with this argument is that trial counsel did not make a constitutional objection; he objected on the basis of relevant. The issue Petitioner claims his appellate counsel should have raised was not preserved at trial and would have been reviewed only for plain error if raised on appeal.

Under Strickland, in evaluating whether an attorney provided objectively unreasonable assistance, a reviewing court should minimize the effects of hindsight and recognize a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Because of this presumption and the reality that effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment does not require that appellate counsel raise every colorable or non-frivolous issue on appeal. Absent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of "sound appellate strategy." The decision to forgo a plain error claim is usually the result of a reasonable winnowing of weaker appellate claims. Therefore, we rarely conclude that an appellate attorney's performance was constitutionally deficient for not raising such a claim.

Roe v. Delo, 160 F.3d 416, 418 (8th Cir. 1998) (internal citations and quotations omitted). There is no contrary evidence, so the presumption this was sound strategy stands, and there was minimal likelihood of success. By the time the redirect started, the jury already knew that Petitioner had talked to Detective Gibson. Thus, the discussion of the *Miranda* waiver could not be understood as a comment on his right to remain silent because Petitioner was not silent. The discussion could not be understood as a comment about his right not to testify, as Detective Gibson's testimony was too attenuated to raise this issue. The Court rejects the claim.

Z. Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's In-Court Identification of Petitioner

During his direct examination, Black testified that he was shown approximately four videotape lineups in September 1987; some of the men looked like the men involved in the crime, but he was unable to positively identify anyone in those

lineups. T.Tr. at 880. On the Saturday before trial, he was shown two videotapes, T.Tr. at 880-81, and was prepared to testify that one of the men was (or at least appeared to be) the man who slashed Wright's throat. The lineup containing the picture in question was one of the four shown to Black in September 1987. T.Tr. at 883, 892-93. On the Monday the trial started, prosecutors told Duncan that Black had identified Petitioner as the man who entered with Buckner. Trial counsel misunderstood the prosecutor and thought he meant that Black had positively identified Ford (who was also in the lineup). T.Tr. at 881-82, 884. Ultimately, the trial court overruled an objection based on the timeliness of the prosecutor's disclosure - the only objection made at trial on this matter. T.Tr. at 884-86.

Petitioner now contends that his appellate counsel was ineffective for failing to challenge Black's identification as unreliable because the lineup was unduly suggestive based on its contents and Black's "repeated exposure" to it. He also argues that appellate counsel should have raised a claim based on the fact that trial counsel was not permitted to be at the private screening held by the prosecutor. None of these objections were made at trial and would have only been reviewed for plain error, so appellate counsel could reasonably refrain from raising them. See Roe, 160 F.3d at 418.

Black's two viewings of the tape occurred approximately sixteen months apart - hardly the repetitious showing Petitioner insinuates occurred. As noted earlier, the Supreme Court has held the Sixth Amendment is not implicated when a criminal defendant is included in a photographic or video array. See Moore v. Illinois, 434 U.S. at 227. The Court is concerned about the suggestiveness of the lineup itself, but Petitioner has

not provided much in the way of legal analysis on this issue.[16] Suggestiveness alone does not qualify an identification. Manson v. Brathwaite, 432 U.S. 98, 112-14 (1977). The key inquiry is reliability, and the factors to be considered

> include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against the factors is to be weighed the corrupting effect of the suggestive identification itself.

Id. at 114 (citing Neil v. Biggers, 409 U.S. 188, 199-200 (1972)).

There are five men in the lineup. One man is wearing a prison shirt and pants, which are noticeable for their pastel-blue color. Petitioner was wearing a prison shirt, but nobody else in the lineup was wearing prison clothing. Counting Petitioner, only two men had a moustache and beard, and the other one was not wearing prison clothing. After initially indicating that some of the men in four different lineups looked like the men involved in the murder, sixteen months passed - at which time Petitioner is shown less lineups that contain a total of two people sharing the attributes of both a beard and moustache, and one of those two individuals was wearing a prison shirt. While this describes a certain amount of suggestiveness, the distance in time between the viewings undercuts its effect to some extent - and, conversely, the distance in time also undercuts the reliability of Black's identification.

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[16]Contrary to Respondent's assertion, the Court has not previously considered the merits of this claim: the Court held it was defaulted because evidence about the lineup was not developed in state court.

Ultimately, the question is not whether admitting Black's identification was error, but whether it was *plain* error, such that the failure to raise the issue on appeal denied Petitioner his Sixth Amendment right to effective counsel. The Court concludes that there was no plain error.

AA. Actual Innocence

Petitioner presents his actual innocence as a substantive ground entitling him to relief. In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court pointed out that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Although actual innocence plays a role in habeas proceedings, it does so only as a supplement to a constitutional claim - not as an independent claim. Id. at 404. The distinction was emphasized in Schlup v. Delo: a free-standing claim of actual innocence is governed by Herrera, whereas a claim of actual innocence used to demonstrate cause and prejudice to overcome a procedural bar to federal review is governed by a different standard (as announced in Schlup). 513 U.S. 298, 315-17 (1995). The Court went on to explain the different standards as follows:

> If there were no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [petitioner's] innocence. On the other hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error, [petitioner's]

> threshold showing of innocence would justify a review of the merits of the constitutional claims.

Id. at 317.

Subsequent Eighth Circuit opinions do not make clear whether Herrera completely bars free-standing claims based on actual innocense or whether, in light of Schlup, it merely erects an extremely high standard for such claims. Herrera was decided in 1993, and Schlup was decided in 195. Four months after Schlup was decided, the Eighth Circuit cited it for the proposition that a free-standing claim of actual innocence is cognizable and relief can be granted only if new facts ""unquestionably establish [the petitioner's] innocence."" Allen v. Nix, 55 F.3d 414, 417 (8th Cir.), cert. denied, 516 U.S. 1014 (1995) (quoting Schlup, 513 S. Ct. at 317) Later, in Meadows v. Delo, the Eighth Circuit was again presented with a free-standing claim of actual innocence and declared that "reliance of Schlup is misplaced." 99 F.2d 280, 283 (9th Cir. 1996). Instead the Meadows Court relied on Herrera to hold that the "claim of innocence based on newly discovered evidence is not cognizable on habeas review." Id. In Cornell v. Nix, the Eighth Circuit relied on Allen and subjected a free-standing claim of actual innocence to the "unquestionable innocence" started. 119 F.3d 1329, 1334 (8th Cir. 1997). Cases continue to fall on both sides of the issue, culminating in Burton v. Dunmire, which relied on Meadows to reject the claim out of hand. 295 F.3d 839, 848 (8th Cir. 2002), cert. denied, 538 U.S. 1002 (2003).

Resolution of Petitioner's claim is easy if the claim is not cognizable: if it is not cognizable, no relief can be granted. However, because the law in this Circuit is not clear, it is prudent for the Court to consider Petitioner's claim under the standard described in Cornell and Allen. This, too, is an easy matter: Petitioner's guilt and defense both depend on the

credibility of eyewitnesses, and most of the testimony is subject to a certain degree of skepticism for a variety of reasons. The Court cannot conclude that Petitioner is "unquestionably innocent."

BB. Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer

In his Amended Petition Petitioner asserted that, while the jury was deliberating, the prosecutor offered to permit Petitioner to plead to second degree murder and receive a sentence of fifteen years. He claims that his trial counsel failed to discuss the plea offer with him, thereby failing to provide ineffective assistance. Petitioner did not present evidence of an offer, and the Court is unable to find an offer was made, Hrg. Tr. at 28-29, 31-33, so this claim fails on the merits.

CC. Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel

On February 3 - the Friday of the first week of trial - Petitioner's lead trial counsel was not present at the start of the day's proceedings. The jury was not given any reason for his absence. T.Tr. at 707. The record does not reflect that he ever appeared at trial that day, and there is no indication he said anything on the record. Petitioner had suggested that Duncan was speaking at a Continuing Legal Education Seminar, but the only evidence of such an event establishes that his presentation occurred after the penalty phase of the trial. Hrg. Tr. at 112-14. Ultimately, it does not matter why Duncan was absent. The critical inquiry was whether Petitioner's Sixth Amendment rights were violated in his absence, and the mere absence of lead trial counsel is not a *per se* violation of that right the focus must be on the events that occurred in Duncan's absence, during which time O'Connor was present. Admittedly, O'Connor became involved in the case at the last minute and

his duties originally were minimal, but by the time of trial, it was contemplated that O'Connor would play a meaningful role in the defense. Petitioner can prevail on this claim on by identifying something O'Connor did or failed to do that constituted ineffective assistance because absent such a showing there is no prejudice from Duncan's absence. Petitioner has not done this so the claim must be denied.

DD. Judicial Bias During Postconviction Proceedings, Part I

The Court denied relief on this claim, and the Eighth Circuit affirmed in the first appeal. White v. Bowersox, 206 F.3d at 783.

EE. Judicial Bias During Trial

This claim was procedurally defaulted when it was not raised on direct appeal. Thus, it was procedurally defaulted before the postconviction proceedings, and the Eighth Circuit's rulings regarding the procedural bar do not affect issues that were defaulted during or before direct appeal. White v. Luebbers, 307 F.3d at 727 n.2.

FF. Judicial Bias During Postconviction Proceedings, Part II

The Court denied relief on this claim, and the Eight Circuit affirmed in the first appeal. White v. Bowersox, 206 F.3d at 783.

GG. Ineffective Assistance of Trial Counsel: "Bad Loser" Comment

During small-group voir dire, one of the jurors related an event that occurred when he had served on a jury previously.

He explained that following the verdict one of the lawyers told him that some of the State's witnesses had lied. He did not recall whether it was a prosecutor or defense attorney. T.Tr. at 417-18. A lengthy discussion (out of the jury's hearing) about the possibility that these comments poisoned the small group ensued. The trial judge struck three of the five potential jurors for cause, T.Tr. at 444, leaving only Venirepersons Benedict (#87) and Ford (#89). Benedict and Ford were returned for additional voir dire, T.Tr. at 454, and the prosecutor was permitted to explain that the incident "was an example of a defense attorney being a bad loser" and "that it certainly wasn't the prosecutor that said a witness lied, and that . . .in fact wasn't the case." T.Tr. at 455. Petitioner contends that his trial counsel provided ineffective assistance in failing to object to these statements.

Petitioner cannot demonstrate prejudice. After excluding those jurors who were struck for cause, peremptory strikes for the main panel were made against jurors with numbers under #79. T.Tr. at 495-96. Benedict and Ford were candidates to be the second alternate, T.Tr. at 496, but both were struck peremptorily. T.Tr. at 499 (identifying jurors and alternates). It is true that at the time of Petitioner's trial, Missouri law provided "that criminal defendants are entitled to a 'full panel of qualified jurors before being required to make peremptory challenges' and that failure to sustain a meritorious challenge for cause is prejudicial error." Sloan, 54 F.3d at 1387 (quoting State v. Wacaser, 794 S.W.2d 190, 193 (Mo. 1990) (en banc)).[17] However, Petitioner cannot argue that his use of a peremptory

[17] Wacaser was legislatively overruled long after Petitioner's trial. Thus, at the time of his trial, Petitioner was entitled to a fully qualified, untainted jury upon which to exercise his peremptory strikes.

challenge on either Benedict or Ford[18] constitutes prejudice under Strickland because none of the alternates were called upon to deliberate. T.Tr. at 1027-29 (jurors identified when polled at the end of the case). Thus, Petitioner was not prejudiced by the prosecutor's comments and the resulting "need" to use a peremptory to eliminate Benedict or Ford as a potential alternate.

HH. Ineffective Assistance of Postconviction Counsel, Part II

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the merits. Even if the claim is not moot, it has been rejected in other cases. E.g., Coleman v. Thompson, 501 U.S. 722 (1991); Lowe-Bey v. Groose, 28 F.3d 816 (8th Cir.), cert. denied, 513 U.S. 1061 (1994).

II. Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims

Within this argument, Petitioner claims his appellate counsel should have raised the following grounds: "verdict directing instructional error, Brady violation by the state, challenges to the prosecution's guilt phase and penalty phase closing arguments." Some of these claims are discussed in greater detail elsewhere in this [illegible]. The argument regarding the verdict director lacks merit, Part II(LL), infra, so his claim of ineffective assistance of counsel must be rejected as well. Similarly, his Brady claim lacks merit, appeal. Finally, Petitioner has not provided sufficient detail about the remaining portions of this claim to permit meaningful discussion (and, in

[18]Both were candidates to be the second alternate, and neither was chosen. Thus, it can be deduced that the prosecutor used his peremptory on either Benedict or Ford and Petitioner used one on the other.

any event, the Court notes that any appeal would have sought only plain error review).

JJ. Ineffectiveness of Trial Counsel: Failure to Request Mistrial During Prosecutor's Closing Argument

During his closing argument following the trial's guilt phase, the prosecutor told the jury that "if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended-" Supp. T.Tr. at 30.[19] Petitioner's trial counsel objected, and the trial court sustained the objection and instructed the jury to disregard the prosecutor's comment. Supp. T.Tr. at 32-33. Prior to the delivery of the cautionary instruction to the jury, Petitioner's trial counsel moved for a mistrial but also stated that "as a practical matter I don't want a mistrial," Supp. T.Tr. at 31-32. After the objection was sustained in open court, trial counsel approached the bench again and moved for a mistrial, and the motion was denied. Supp. T.Tr. at 33.

On direct appeal, Petitioner challenged the trial court's denial of the motion for mistrial. After recounting the circumstances described above, the Missouri Supreme Court held that "[u]nder these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. The defendant cannot complain about the denial of a mistrial when his counsel plainly told the court that he did not want this relief." White I, 813 S.W.2d at 866.

Petitioner does not challenge the denial of the mistrial; instead, he argues that trial counsel's actions constituted

[19] This is a reference to the Supplemental Trial Transcript, which contains the prosecutor's closing argument.

ineffective assistance. Whether to seek a mistrial is a strategic decision, particularly given that Duncan believed (albeit mistakenly) that there was a good chance the jury would acquit Petitioner. Assuming the performance prong was violated, the Court discerns no prejudice. The curative measures employed by the trial judge were more than adequate, and there is not a reasonable probability that a mistrial would have been ordered (particularly since the trial judge denied the belated request).

KK. Ineffective Assistance of Appellate Counsel
Failure to Raise Claim Based on *Brady v. Maryland*

The prosecution in a criminal manner has a constitutional obligation to disclose exculpatory evidence to the defendant. See Brady v. Maryland, 373 U.S. 83 (1967), Giglio v. United States, 405 U.S. 150 (1972). "A finding of materiality of the evidence is required under Brady." Id. at 154. Exculpatory evidence is considered material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Strickler v. Greene, 527 U.S. 263, 280 (1999) (quotation omitted). Non-disclosure merits relief only if the prosecution's failure "undermines confidence in the outcome of the trial." Kyles v. Whitely, 514 U.S. 419, 434 (1995) (quotation omitted). The Supreme Court has rejected any distinction between impeachment evidence and exculpatory evidence. See Bagley, 473 U.S. at 676. The "individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437.

Petitioner contends Brady was violated when the picture Detective Glynn took was not disclosed until trial.[20] For the

[20]Petitioner has also offered a letter from Duncan's predecessor in an attempt to establish that the picture's existence was denied by the State until trial. This letter contains and constitutes hearsay, and the Court must disregard it.

sake of argument the Court will assume the picture was not disclosed until trial,[21] but the claim still fails because the picture is not evidence of anything. It has no role in this case unless it was shown to one of the victims, but there is no evidence that this happened. It is not even clear that the picture was used as part of a photographic array. The issue is discussed in greater context in Part II(SS)(2), *infra*. Moreover, Brady was not violated even if the picture was not revealed until trial, because Petitioner has not demonstrated that the late disclosure prevented Petitioner from obtaining a fair trial. Cf. United States v. Parker, 267 F.3d 839, 846 (8th Cir. 2001), cert. denied, 535 U.S. 1011 (2002). Petitioner was not denied ineffective assistance of counsel because there is no basis for arguing that Brady was violated.

LL. Ineffective Assistance of Appellate Counsel: Verdict Director

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

MM. Ineffective Assistance of Postconviction Counsel, Part III

This issue is moot in light of the Eighth Circuit's rulings declaring that all claims (with certain exceptions not implicated by the postconviction process) must be considered on the

[21] At the hearing, O'Connor testified that he saw it for the first time at the trial. Hrg. T. at 81. There is no evidence as to whether the photograph was in the file available for counsel's inspection or whether Duncan was aware of its existence.

merits. Even if the claim is not moot, it has been rejected in other cases. E.g., Coleman v. Thompson, 501 U.S. 722 (1991); Lowe-Bey v. Groose, 28 F.3d 816 (8th Cir.), cert. denied, 513 U.S. 1061 (1994).

NN. Ineffective Assistance of Trial Counsel: Former Prosecutor as Defense Attorney

O'Connor was Trial Director for the Jackson County Prosecutor's Office when Wright's murder was being investigated and when the indictment in this case was filed. He also speculates that O'Connor "reviewed the case and assigned it to Mr. Hall and Mr. Peters for trial. He also may have been involved in the decision to seek the death penalty." Prior to jury selection, Duncan asked Petitioner if he understood that O'Connor would be assisting in the case. He also indicated his understanding that O'Connor "until about a year ago was in the Prosecuting Attorney's Office" but that he had not reviewed Petitioner's case during his employment as a prosecutor. T.Tr. at 4-5.

Petitioner now contends that O'Connor's status as a former prosecutor constituted ineffective assistance of trial counsel. His mere status as a former prosecutor does not violate Strickland. The Court finds that O'Connor had no involvement in Petitioner's case while he was a prosecutor, Hrg. Tr. at 68-69, so there is no factual basis for this claim.

OO. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Opening Statement

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that

anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

PP. Proportionality Review

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

QQ. Ineffective Assistance of Trial Counsel: Wasting a Peremptory Strike

Petitioner contends that his trial counsel provided ineffective assistance when he "wasted" a peremptory strike on a prospective juror that had already been struck, but the record belies Petitioner's factual assertions. The venireperson in question, Cassandra Hughes, was number 60 on the panel. She was questioned during small-group voir dire, T.Tr. at 352-53, and neither party asked that she be struck for cause. T.Tr. at 353-54. She was not listed among those whom the parties agreed to strike. T.Tr. at 493-94 (discussion of panelists the parties mutually agreed to excuse). Her number was low enough to include her as a potential juror. T.Tr. at 496. While the attorneys were considering their peremptory strikes, Hughes reported that she had the flu and the trial court asked the parties to confirm their agreement that she could be sent home immediately. Although the parties agreed with the factual statement that she could be excused, they did not agree that she would be struck for cause. Specifically, the prosecutor declared "[f]or now I think all we need to do is say that she's going to be

excused because the defendant may end up striking her as one of their peremptories. . . ." T.Tr. at 498. The discussion then turned to the subject of the alternate jurors. The prosecutor never agreed that Hughes could be excused for cause; instead, the participants were simply acknowledging defense counsel's intent to strike Hughes, thereby permitting Hughes to leave immediately instead of waiting in the jury room, sick with the flu, until she was later formally dismissed. None of Petitioner's peremptory strikes were "wasted."

RR. Right to Be Present at Critical Stages

This claim was procedurally defaulted when it was not raised on direct appeal. Thus, it was procedurally defaulted before the postconviction proceedings, and the Eighth Circuit's rulings regarding the procedural bar do not affect issues that were defaulted during or before direct appeal. White v. Luebbers, 307 F.3d at 727 n.2.

SS. Ineffective Assistance of Trial Counsel: Myriad of Claims

Within this single claim, Petitioner asserts several claims of ineffective assistance of trial counsel. He contends his attorney was ineffective for (1) failing to elicit helpful testimony from Ben Kinney, (2) failing to challenge suggestive pretrial identification procedures, (3) failing to effectively impeach Ernest Black and Carol Kinney, (4) failing to prepare for trial, and (5) eliciting a positive identification of Petitioner from Ernest Black. The Missouri Supreme Court deemed the first four issues to be procedurally defaulted, but addressed the fifth claim on the merits; this Court has not yet had the opportunity to consider the merits of the first four issues.

1. Failing to Elicit Testimony from Ben Kinney

In paragraphs 344-46 of his First Amended Petition, Petitioner describes the evidence that Ben Kinney could have provided. He allegedly could have testified that Wright and Kinney were using and selling cocaine and that two men known as "A.J." and "Josh" had threatened to kill them. The jury was already aware that Wright and Kinney were using cocaine, and the fact that they were also selling it has no independent relevance except (maybe) to connect them to the men who allegedly wanted to kill them. However, Ben Kinney did not testify at the January 2004 hearing; so the Court has no basis for determining that Petitioner was prejudiced by the failure to elicit any testimony from him.

2. Failing to Challenge Suggestive Pretrial Identification Procedures

In an argument related to the one addressed in Part II[Z], supra, Petitioner contends his attorney should have challenged the suggestive identifications made by both Kinney and Black. In September 1987, Black was shown approximately four videotaped lineups; he failed to make a positive identification. T.Tr. at 880. The weekend before trial - approximately sixteen months later - Black was shown two of those same lineups. T.Tr. at 880-81. Petitioner's attorneys were not contacted prior to the January 1989 viewing, nor were they present for it. The next Monday - the day trial started - Duncan was told that Black had identified the third man in the lineup as the second man at Kinney's house, but he misinterpreted the information to mean that Black had identified the third man at Kinney's house. The third man at Kinney's house was fairly well established as being Cleveland Ford. When Duncan's misunderstanding came to light on the Saturday of trial,[22] Petitioner's counsel objected on the basis of the lateness of the disclosure, but the trial court held

[22]This is not a misprint: the transcript reflects that trial proceedings occurred on February 4, 1989, which was a Saturday.

that the objection was untimely. T.Tr. at 881-86. Black denied receiving any information about the individuals in the videotapes prior to viewing them in January 1989. T.Tr. at 886. He also denied remembering whether the videotapes he saw immediately before trial were shown to him in September 1987. T.Tr. at 954.

Several issues related to Black's identification were discussed and rejected in the Court's second order, and the Court declined to issue a Certificate of Appealability. Further discussion is not warranted, except for one respect: Petitioner's contention that an objection should have been made based on the suggestiveness of the lineups. As noted earlier in Section II(Z), the real issue is reliability; suggestiveness is a factor to be considered when evaluating reliability. While the circumstances of Black's identification and the characteristics of the lineup certainly represented grounds for impeachment of both victims, the Court does not believe the identification was unconstitutionally unreliable.

As part of this argument, Petitioner has insisted that both Kinney and Black were shown the picture Detective Glynn took of Petitioner. A showing of a single photograph is a factor in determining the reliability of an identification, but the Court is unable to find this happened. Support for Petitioner's suspicions consists largely of speculation; there is not testimony to support it. See T.Tr. at 759, 771-72, 782-83 (testimony of Detective Gibson denying that he showed a single picture to Kinney); Hrg. Tr. at 257, 260 (same); T.Tr. at 747, 750 (testimony of Detective Glynn denying that he interviewed Kinney or showed her Petitioner's picture); T.Tr. at 637-44 (testimony from Kinney describing her identification of assailants); Hrg. Tr. at 364-67, 393-95 (testimony of Kinney disavowing any memory of seeing Petitioner's picture before viewing the lineup, and never indicating that she saw any

picture (including Petitioner's) in isolation): T.Tr. at 662-63 (similar testimony).

Petitioner makes much of the fact that a picture, if available, would be "used" in the investigation, but this does not establish that it would be used in a suggestive or otherwise inappropriate manner. As Detective Gibson explained, a photograph (such as the one taken by Detective Glynn) would be used as part of an array comprised of several photographs. Hrg. Tr. at 263-64. Petitioner also points to Kinney's deposition from Buckner's trial, wherein she indicated (at pages 97-98) that she saw Petitioner's picture before identifying him from the lineup. However, that passage does not indicate that she saw Petitioner's picture in isolation; in fact, on page 18 of her deposition she denied ever being shown just one paragraph. The Court finds that neither surviving victim was shown a photograph of Petitioner by itself.

3. Failing to Effectively Impeach Kinney and Black

This claim is described in paragraphs 357-58, and alleges that Kinney and Black should have been impeached with their prior inconsistent statements and with testimony from Ben Kinney. As noted earlier, Ben Kinney's testimony has not been presented to any tribunal, so this aspect of the claim must fail. The Court also notes that Kinney and Black were impeached on a variety of inconsistencies in their statements. The Court holds that neither of Strickland's prongs was violated.

4. Failing to Prepare for Trial

This claim raises concerns including Duncan's failure to interview witnesses, conduct depositions, or plan for the penalty phase. These issues are raised more specifically and more thoroughly in the context of other claims, so this claim is rejected as duplicative.

5. Eliciting Harmful Testimony from Black

This Court rejected this claim on the merits in its first Order. The Court's holding is repeated below:

> [T]he Missouri Supreme Court affirmed the trial court's finding that "counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before and at trial. At most, therefore, Black's response to counsel's questions was cumulative." White III, 939 S.W.2d at 898. This finding is supported in the record and is entitled to deference. E.g., Pryor, 103 F.3d at 712-13. In light of this finding, Petitioner cannot satisfy either of Strickland's prongs.

This issue was not included in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims.

TT. Conflict of Interest, Second Appeal

This claim was previously denied on the merits, and the Eighth Circuit affirmed this decision. White v. Bowersox, 206 F.3d at 782-83.

UU. Restrictions on Cross-Examination

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestion that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

WW. Cumulative Errors (Generally)

The Court rejected this claim on the merits in its first Order and declined to include the issue in the Certificate of Appealability. In its first opinion, the Eighth Circuit held there was no need to reconsider claims that had already been addressed on the merits, and there is no suggestions that anything in the Eighth Circuit's second opinion requires reconsideration of those claims. Accordingly, this claim is rejected.

III. CONCLUSION

For the foregoing reasons, Petitioner's application for a Writ of Habeas Corpus is granted in part and denied in part. Petitioner's conviction and death sentence must be vacated. Within forty-five days after this Order becomes final (including any appeals that may be taken), the State must commence a new trial; if the State does not do so, Respondent must release Petitioner from custody.

IT IS SO ORDERED.

/s/Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

Dated: June 14, 2004

United States Court of Appeals,
Eighth Circuit.

Leamon WHITE, Appellant,
v.
Al LUEBBERS, Appellee.
No. 01-3044WM.

Submitted: Sept. 10, 2002.
Filed: Oct. 11, 2002.

Stephen D. Hawke, argued, Jefferson City, MO, for appellee.

Before HANSEN, Chief Judge, RICHARD S. ARNOLD and LOKEN, Circuit Judges.

RICHARD S. ARNOLD, Circuit Judge.

This is a petition for habeas corpus brought by Leamon White, a prisoner in state custody. Mr. White has been sentenced to death for first-degree murder. His case is now before us for the second time. On the prior appeal, *White v. Bowersox*, 206 F.3d 776 (8th Cir.), *cert. denied*, 531 U.S. 917, 121 S.Ct. 275, 148 L.Ed.2d 200 (2000), we remanded the case to the District Court "for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits." 206 F.3d at 783.

On remand, there was disagreement about the meaning of this Court's directions. The principal issue addressed in our previous opinion was the Missouri doctrine of "abandonment," under which the omissions of an appointed post-conviction lawyer can be so serious that the lawyer is said to have "abandoned" the client, with the result, in most cases, that the client is allowed to proceed anew. The Missouri courts had held that Mr. White had been abandoned by his appointed

post-conviction lawyer, but had limited the remedy for this default. Our major holding was that the remedy should not have been limited, and that the procedural bar asserted by the State (the state courts' limitation of the remedy for abandonment) was not adequate to prevent federal habeas corpus review on the merits. On remand, the State took the position that only those claims contained in Mr. White's second amended state-court post-conviction motion were open for review on federal habeas. The State argued that the rationale underlying our holding that the remedy for abandonment had been impermissibly limited went only that far, and that it did not extend to opening up for federal habeas merits review other constitutional claims asserted by Mr. White. Petitioner, on the other hand, argued that our previous opinion should be applied as written, that all of his constitutional claims "except those claims that the District Court ha[d] already addressed on the merits," 206 F.3d at 783, should be decided by the District Court without regard to procedural default arguments asserted by the State.

The District Court agreed with the State on this point. It observed that a number of petitioner's claims had not been raised in his second amended post-conviction motion in the state courts, and that those claims appeared to be defaulted even if the claims raised in the second amended motion were now open for review. The Court observed further that our previous opinion had been "limited to consideration of a single argument regarding procedural default." *Leamon White v. Al Luebbers*, No. 97-1663-CV-W-3, slip op. 3 (W.D. Mo., opinion filed April 3, 2001). Accordingly, the District Court proceeded to decide the merits of only those claims that had been raised in petitioner's second amended motion. As to the other claims urged by petitioner, it adhered to its holding, made in the previous stage of the case, that these claims were procedurally barred for reasons unrelated to the abandonment doctrine.

The major issue before us on this, the second appeal, is the scope of our remand. The District Court and both parties agree that that Court was bound to proceed in accordance with our directions, but they disagree as to what these directions were. It is now our job to decide the legal effect of our previous opinion. That this question has arisen at all is due, at least in part, to some lack of clarity in our previous opinion, and the writer of this opinion (who also wrote the first one) acknowledges this responsibility.

On full consideration, we now hold that the terms of remand embodied in the previous opinion require the District Court to consider, on their merits, all federal constitutional claims that have not previously been decided on the merits, with a limited exception to be described later in this opinion. As to those claims that the District Court did decide on the merits after the remand following our previous opinion, we affirm. The judgment of the District Court will be affirmed in part, reversed in part, and the cause remanded for further proceedings to be set out at the end of this opinion.

I.

A description of the procedural context surrounding the first appeal will help us explain the conclusion we are reaching. In that case, petitioner raised a variety of constitutional claims. The State asserted that many of them were procedurally barred. The petitioner responded with two main arguments: that the state rules of procedure asserted as bars had not been applied regularly enough to constitute adequate and independent state grounds, and that, in any event, he had made, or could make, a showing of actual innocence, which would avoid the effect of any procedural bar. The first of these two arguments, which we may call, for present purposes, "inadequate state grounds," itself had two parts: that the state rule requiring fact pleading in post-conviction motions had been applied too strictly, or in an unexpected way, to some of the claims asserted in petitioner's

first amended post-conviction motion; and that the state courts' limitation of the remedy for abandonment was unexpected and could not have been anticipated beforehand. (Thus, this limitation of the remedy could not be said to have been regularly applied, a requirement of the adequate-state-ground doctrine.)

As our study of the case went forward following the argument, it began to seem that this last point, which can be referred to in shorthand as the abandonment point, would go in petitioner's favor. There were many claims and several arguments for avoiding procedural bars, and we were uncertain whether all of the issues would need to be addressed. We thought it prudent, therefore, to consult counsel for both sides. On December 23, 1999, the following order was entered:

> As we understand the case, appellant makes two basic arguments for avoidance of a procedural bar: inadequate state ground and actual innocence. If the Court decides that either one of these arguments is well taken, is there any reason why it would need to address the other one? Are there any issues the merits of which would be opened up, so to speak, by holding in favor of appellant on the question of actual innocence, but not by a holding in favor of appellant on the issue of adequate state ground?

As indicated, at the time this order was entered, we thought of the phrase "inadequate state grounds" as a shorthand description of two distinct but related procedural-bar issues: inadequate pleading and abandonment. We thought of these issues as interrelated, in the sense that, if the abandonment issue went in petitioner's favor, all claims pleaded in the second amended motion, which itself had incorporated both the original motion and the first amended motion, would be open for review. Thus, it would not be necessary separately to decide the

pleading issue, which concerned only the first amended motion. This view is reflected in the opinion we ultimately filed. There, we said:

> The predominant issue on appeal is whether the procedural rule barring the second motion [the limitation on the remedy for abandonment] was an adequate state ground. This issue is practically determinative of Mr. White's habeas petition because almost all of the claims raised in the first motion, which was hastily drafted, were procedurally defaulted due to inadequate fact pleading.

White v. Bowersox, 206 F.3d at 778.

Looking back, it now appears that this view, that overcoming of the procedural rule barring the second amended motion, would be determinative of the case, may have been mistaken. [FN1] Take, for example, a claim asserted in the second amended motion, but only through incorporation of the first amended motion by reference. A holding that the second amended motion was not barred by a procedural default would open up the claims made in that motion, but if one of those claims was itself subject to a separate procedural infirmity, inadequate fact pleading, it is at least arguable that that separate difficulty should have been addressed. This, however, is not what we did. Footnote 4 of our opinion clearly so indicates:

> FN1. Our first opinion is the law of the case. As such, both the District Court and this Court are obliged to follow it in later proceedings unless we determine that the first opinion was clearly erroneous and worked a manifest injustice. *United States v. Palmer*, 297 F.3d 760, 766 (8th Cir.2002). The State does not suggest that either of these conditions exists in the present case, nor do we believe that they do.

> Our holding that consideration of the second amended petition was not barred by an adequate state procedural ground makes it unnecessary to consider the adequacy of the state pleading rules held to bar most of the claims in the first amended petition. We likewise need not consider petitioner's assertion that his actual innocence excuses any procedural default.

Id. at 780 n. 4.

We resume the narrative of the procedural history of the case. In response to our order of December 23, 1999, the pertinent parts of which have already been quoted, the parties gave us their views and supplemental briefs. The petitioner said:

> If the Court decides in Mr. White's favor on the basis of the inadequate state ground issue or the related cause and prejudice issues, it need not reach his actual innocence argument.... The reason for this is that all of these arguments are separate mechanisms for avoiding procedural default.... If the Court finds one mechanism lifts the procedural bar, it need not address the others.

Supplemental Answer and Brief of Appellant 24.

The State's response was not identical, but it was similar:

> A determination that the State's procedural rule upon which petitioner's numerous grounds for relief were defaulted--i.e., the pleading requirements under Rule 29.15(b, g)--was not independent and adequate, would not require a determination on petitioner's actual innocence claim because those claims previously deemed procedurally defaulted would be subject to review on the merits.

Supplemental Brief of Respondent 23. This response did not expressly refer to the abandonment issue, but only to pleading requirements. We understood it to mean, however, that the abandonment issue, if decided in petitioner's favor, would, in the view of the State, make determination of other procedural-bar questions unnecessary, because it was the lawyer who drafted petitioner's first amended motion who was later held to have abandoned him. 206 F.3d at 781. Even if the pleading in that motion were inadequate, therefore, it should not be held against petitioner, in our view.

All of this is by way of explaining what went on between our Court and the parties before the filing of our first opinion. When that opinion was filed, its conclusion, where one would normally look for a description of directions to be followed on remand, read as follows:

> Accordingly, we reverse in part, affirm in part, and remand to the District Court for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits.

206 F.3d at 783. The same statement, though made in somewhat different words, appears at the beginning of the opinion:

> We reverse and remand for further proceedings on the merits of those claims the District Court held to be procedurally barred.

Id. at 778. We think the purport of these expressions, especially when considered against the procedural history of the case, described earlier in this opinion, is plain. The District Court was to consider, on remand, all claims on their merits, except those claims that had previously been so considered. Our conclusion in this regard is strengthened by the fact that the

State, both in its petition for rehearing and rehearing en banc in this Court, and in its petition for certiorari filed with the Supreme Court, adopted this interpretation of our directions. We now hold that the District Court, on remand from this second appeal, should proceed accordingly. [FN2]

> FN2. There is a group of claims that need not be considered further, however. These claims, lumped together by the parties under the label of "trial error," relate to events occurring at the trial in the state courts, and represent, in each case, points that were either not preserved at the trial, or were not included in petitioner's direct appeal to the Supreme Court of Missouri. At the oral argument in the present appeal, counsel for petitioner agreed that these claims did not need to be considered on their merits. An example of such a claim appears to be claim RR, based on the theory that Mr. White's federal rights were violated when he was not present at a post-trial hearing about one of the jurors who had failed to reveal that a relative of his had been an acquaintance of one of the victims. This claim was not raised on direct appeal nor in the post-conviction proceedings. The District Court held that the claim was procedurally barred (J. A.1505, 1861). We do not understand petitioner to disagree with this holding.

II.

On remand from our first opinion, the District Court did reach the merits of three claims. We now turn to a discussion of these claims.

1. Mr. White first argues that he was deprived of the effective assistance of trial counsel during voir dire. Counsel, he says, deliberately failed to ask potential jurors any questions relating to the death penalty. He did not ask, for example, if there were jurors who would automatically impose the death penalty after

a finding of guilt of first-degree murder. Nor did counsel attempt to rehabilitate jurors who had reservations about the death penalty. In addition, petitioner argues, counsel failed to ask potential jurors about certain issues that were going to arise in the case, such as eye-witness identification, graphic photographic evidence, and children as witnesses. Voir dire is an essential part of any trial, petitioner argues, and here his lawyer was guilty of total default, a decision not to participate in voir dire at all, at least so far as questions pertaining to the death penalty were concerned.

We are urged to hold that this failure on the part of counsel was so serious that prejudice can be presumed. The normal rule, of course, is that, in order to establish ineffective assistance of counsel, a petitioner must show (1) that counsel's performance fell below what can normally be expected of a professional defender; and (2) that this defective performance caused prejudice. The term "prejudice," in turn, is defined as a reasonable probability that the outcome of the trial would have been different, and this formulation is further refined by the statement that such a reasonable probability is shown if the reviewing court, after surveying the entire record, lacks confidence in the outcome. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

We assume for present purposes that counsel's performance was seriously deficient. The lawyer states that his failure to participate in voir dire was deliberate and conscious, and that he chose not to do so because he wished to avoid focusing potential jurors' attention on the fact that this was a death-penalty case. If this was a strategic decision, it was also an unreasonable one. The decision left the field entirely to the State. The State was free, for example, to "rehabilitate" a potential juror who had appeared, in his initial answers to questions, to believe that the death penalty should automatically be imposed. The State might, for example, get such a juror to

agree that, despite his initial statement, he could and would apply fairly the court's instructions, and would impose the death penalty, if at all, only in accordance with those instructions. The process might also work the other way. That is, a juror might initially indicate doubts about the death penalty, a circumstance which might justify a challenge for cause on the part of the State. In this situation, defense counsel would normally ask further questions to reason with the juror about his expressed doubts, and try to get the juror to say that, despite any policy or emotional preferences he might have, he would apply the law fairly and impartially as given by the court in its instructions. We see no way to justify a failure on the part of defense counsel to participate in this process at all. Such a strategy did not avoid focus on the death penalty; instead, it left the State entirely free to define this focus in its own terms.

Petitioner does not contend that *Strickland* prejudice in the normal sense can be shown here. Suppose counsel had followed a proper strategy and questioned the jurors thoroughly about the death penalty and other matters. We have no idea what their answers would have been. We have no idea what rulings the trial court would have made, for example, on challenges for cause, after hearing those answers. And we have no idea how the makeup of the jury would have been changed, if at all. If, for example, voir dire by defense counsel had succeeded in rehabilitating a potential juror, and a challenge for cause by the State had thereafter been overruled, the State might still have avoided that juror by exercising one of its peremptory challenges. In short, we do not know that any person who got on the jury was prejudiced against the defendant or in favor of the death penalty, and we do not know what difference in the composition of the jury additional voir dire would have made.

Petitioner argues, however, that prejudice should be presumed. The Supreme Court has recently recognized and restated this exception to the general rule of *Strickland*:

> We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. But only in "circumstances of that magnitude" do we forego individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict.

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 1240-41, 152 L.Ed.2d 291 (2002) (internal citations omitted). The principal authority usually cited in support of this exception is *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In our view, the exception does not apply here. *Cf. Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1851-52, 152 L.Ed.2d 914 (2002) (applying *Strickland* prejudice requirement where attorney did not offer mitigating factors and waived closing argument at penalty phase). Counsel was not denied entirely, nor was the assistance of counsel denied entirely during a critical stage of the proceeding. We agree that voir dire is a critical stage, but petitioner did have counsel, and counsel proceeded on the basis of his own professional judgment, even though misguided. More importantly, we do not believe that the likelihood of prejudice is inherently so great in the present situation as to justify dispensing with the usual requirement that prejudice must be shown. Mr. White points out that his lawyer failed to ask a single question of twenty-four potential jurors who were removed for cause because they had expressed reservations about the death penalty. There is simply no way of gauging the likelihood that some of those jurors would have served on the actual trial jury if voir dire questions had been asked, nor is there any way of showing that the jurors who did actually serve were not completely fair. The Supreme Court has applied the presumption-of-prejudice exception to *Strickland* in

very few cases, most of them apparently involving active representation of conflicting interests. *Mickens, supra*, 122 S.Ct. at 1241. This is not such a case, nor, in our opinion, is there any similar reason for presuming prejudice. Accordingly, we affirm the District Court's disposition of this point on its merits.

2. Petitioner argues that his lawyer was guilty of ineffective assistance of counsel because he did not request the removal of juror Tuggle. This juror, petitioner asserts, was guilty of misconduct. It is said that other members of the jury had expressed concerns that Ms. Tuggle was not paying attention, and doubts whether she was in full possession of her faculties. A bailiff also reported that Ms. Tuggle did not seem able to follow the Court's instructions that she should not watch television news. The bailiff further reported that Ms. Tuggle expressed a desire to hurry the deliberations, and that she had discussed various matters with the jurors, including her opinion that Ted Bundy got what he deserved.

We agree completely with the District Court's disposition of this claim. The bailiff did not actually report that the juror had watched the news, and the fact that she had formed and communicated an opinion about one of the most notorious mass murderers in the country is not grounds for removal. She was discussing the case with her colleagues before final instructions were read, which was not proper, but we agree with the District Court's comments on this particular issue:

> Although she was discussing the case before final instructions were read, the Court does not believe this would have required her removal. A discussion of the case with fellow jurors after the evidence is in is the sort of "minor misconduct" that a trial court would have the discretion to decide does not warrant removal.

District Court opinion at 8. It is significant, in addition, that petitioner himself, when asked by his trial lawyer, said he wanted Ms. Tuggle to remain on the jury. If the lawyer, contrary to his client's desires, had moved to remove Ms. Tuggle, we have no reason to suppose that the motion would have been granted, or that denying it would have been error. We affirm the District Court's denial of this claim on the merits.

3. Petitioner argues that he received ineffective assistance of trial counsel because counsel failed to object to the prosecutor's allegedly improper closing argument during the penalty phase. The District Court's opinion fully discusses six particular respects in which petitioner claims the State's penalty-phase closing argument was fundamentally unfair. We have little to add to that opinion, which is comprehensive and well reasoned. District Court opinion 17-20. Take, for example, the prosecutor's argument that the jurors should impose the death penalty so that society would have retribution. There is nothing improper about this argument. The desire for retribution, while not perhaps always a commendable motivation, is a legitimate purpose of the criminal law. A prosecutor requesting the death penalty quite naturally believes that this purpose will not be accomplished if the death penalty is not imposed. There is nothing wrong with telling the jury this. The jury of course does not have to be persuaded. That is entirely its own business. We affirm on its merits the District Court's determination with respect to the conduct of trial counsel in choosing not to object to the six specific instances of allegedly improper closing argument that the District Court reached on their merits.

III.

Finally, petitioner asks that, if there is to be a remand, we direct the assignment of this case to another judge of the District Court. This argument is based upon a preliminary order

of the District Court entered after our remand. The order stated that the Court had reached a "preliminary view" as to the meaning of our mandate. This preliminary view was consistent with the view ultimately taken by the District Court, that is, that our opinion on the first appeal opened up for consideration on the merits on remand only those issues asserted in the second amended post-conviction motion. The Court's preliminary order invited the parties to express their views on the matter, in light of the Court's stated initial inclination.

Petitioner argues that the order created an "impression," Brief for Appellant 81, "that the Court had prejudged the issue of the mandate's scope ...." We disagree. People often make up their minds by degrees, and judges are no exception to this rule. There is nothing improper about a judge's sharing his or her tentative impressions or inclinations with the parties in advance of reaching a final decision. In fact, there are situations in which this can be a helpful procedure. It gives counsel on both sides a target to shoot at, so to speak, and alerts them as to the issues that they need to be addressing. In oral argument in this Court, for example, one of the judges on the panel, having read the briefs, may very well say to counsel for one side or the other that he or she had a certain tentative view of a question immediately before entering the courtroom, and may then invite counsel to inform the judge why this tentative view is wrong. Such a practice does not indicate bias at all. It simply shares with the lawyers the judge's state of mind at some point between initially picking up the briefs and coming to a final conclusion, which will occur, at the earliest, only after the oral argument and the conference.

The Supreme Court's opinion in *Liteky v. United States*, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994), is dispositive of this point. So long as the court's expressed views come from the record of the case itself, or from representations properly made by the parties or their lawyers, nothing improper

has occurred. "Not *all* unfavorable disposition towards an individual (or his case) is properly described by [the] terms" bias or prejudice. *Id.* at 550, 114 S.Ct. 1147 (emphasis in original).

> Also not subject to deprecatory characterization as "bias" or "prejudice" are opinions held by judges as a result of what they learned in earlier proceedings. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant.

Id. at 551, 114 S.Ct. 1147. Nor was there anything so extreme or emotional about the District Court's order in this case that one would be justified in inferring personal bias or favoritism. In short, we find the case for assignment to a different judge unconvincing, and we decline to make such a direction.

IV.

So much as the judgment of the District Court has rejected on their merits the three claims described in part II of this opinion is affirmed. So much of that judgment as declined to reach other claims presented on grounds of procedural bar is reversed, and the case is remanded to the District Court with the following instructions: to decide on their merits all claims alleged in the petition for writ of habeas corpus, not previously decided on their merits, except those claims falling within the group described in footnote two of this opinion.

It is so ordered.

307 F.3d 722

(Aug. 28, 2001)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	*	
	*	
Petitioner,	*	
	*	
v.	*	Case No. 97-1663-CV-W3
	*	
DON ROPER,	*	
Superintendent,	*	
	*	
Respondent.	*	

ORDER DENYING PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS

On December 4, 1998, the undersigned denied Petitioner's application for a Writ of Habeas Corpus. The Order observed that "the issue of procedural default predominates over the substantive claims asserted by Petitioner," slip op. at 6, and started its legal analysis by considering the four distinct arguments Petitioner presented as grounds for overcoming the procedural bar: (1) actual innocence, (2) ineffective assistance of post-conviction counsel, (c) abandonment by post-conviction counsel, and (d) adequacy of state procedural rules. The Court concluded there was no basis for overcoming the procedural bar, then considered and rejected the merits of Petitioner's non-defaulted claims. In some instances the Court also advanced alternative holdings for the defaulted claims, concluding they lacked merit.

The Eighth Circuit reversed, holding that certain state procedural rules were inadequate to constitute a procedural bar.

White v. Bowersox, 206 F.3d 776 (8th Cir.), cert. denied, 121 S. Ct. 275 (2000). The parties have supplied the supplement briefing requested by this Court, and after considering those briefs and the record the Court denies Petitioner's application for a Writ of Habeas Corpus.

I. SCOPE OF REMAND

The scope of remand is in serious dispute. The Eighth Circuit's opinion focused on the Missouri Supreme Court's determination that claims raised in the Second Amended 29.15 Motion were not to be considered because state rules did not permit a second amended motion to be filed. In its October 3, 2000 Order directing the parties to provide supplemental briefing, this Court declared that "the undersigned originally observed that a number of Petitioner's defaulted claims had not been raised in the second amended Rule 29.15 motion; thus, those claims appeared to be defaulted even if the claims raised in the second amended Rule 29.15 motion could be considered (as will happen now in light of the Eighth Circuit's decision). In other words, even though claims contained in the second amended Rule 29.15 motion can now be considered, not all of the claims previously adjudged to be defaulted were contained in the second amended motion."

This statement was made without knowledge this issue had been the subject of some dispute before the Court of Appeals in the form of various post-decision briefings. However, although both parties argued about the scope of remand, neither one has identified an order from that court specifically addressing those arguments.

"The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority, i.e., the district court. The District Court is bound by the [appellate] decree and must carry it into

execution. On remand, the district court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in light of the opinion of [the appellate] court deciding the case." Pearson v. Norris, 94 F.3d 406, 409 (8th Cir. 1996) (internal citations and quotations omitted). Here, the Eighth Circuit described its decision as "hold[ing] that the state procedural rule that barred Mr. White's second amended motion was inadequate to bar federal consideration of *these* claims." White, 206 F.3d at 778 (emphasis added). In the concluding portions of the discussion on this point, the court declared that "the new principles announced by the Missouri Supreme Court in [Petitioner's] case were not available to guide him. . . . Because these principles were neither readily ascertainable nor firmly established, *the procedural default that ensued* cannot be considered an adequate state ground to bar federal review." Id. at 782 (emphasis supplied). The court's holding is not so broad (or at least is not clearly so broad) to declare that *all* grounds for procedural default were invalid. This observation is particularly important in this case for two reasons. First, some claims involved trial errors that were defaulted at trial or on direct appeal. Those claims were defaulted before any 29.15 motion was filed, and the default could not be cured by including such issues in the Second Amended 29.15 Motion. Second, some issues Petitioner advances in this forum were not included in his Second Amended 29.15 Motion. Thus, even though the state rule barring a second amended petition could not provide the basis for a procedural default, these claims were defaulted because they were not included in the second amended petition and thus were never presented to the state courts. The fact that claims in the Second Amended 29.15 Motion can now be considered will not cure the failure to present a particular claim at any stage of the state court proceedings. This conclusion does not violate the spirit of the appellate court's holding, which was limited to consideration of a single argument regarding procedural default. A single claim can be defaulted for a variety of reasons, and the

fact that one such reason is removed does not mean that all are removed. Put another way, Petitioner was required to give the state courts a "fair" opportunity to consider his claims. O'Sullivan v. Boerckel, 526 U.S. 838, 844 (1999); but even if one considers Petitioner's attempt to present claim included in the Second Amended 29.15 Motion there remain some claims that Petitioner gave the state courts no opportunity to consider. Those claims were, and remain, defaulted.

Petitioner focuses upon the Eighth Circuit's directive that the case was "remand[ed] to the District Court for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits," id. at 782, and compares it favorable to the instruction in Pearson that the court on remand "consider the merits of [the petitioner's] claims." Pearson, 94 F.3d at 409. On remand, the district court concluded the claims were defaulted, but on the subsequent appeal the Eighth Circuit referenced the language of the remand and held that the district court "had no power on remand to address any issues other than the merits of Mr. Pearson's sixth amendment claims relative to ineffective assistance at trial." Id. at 410. From this, Petitioner concludes that all claims previously held to be defaulted - - regardless of the reasons for that conclusion - - are to be considered. Respondent draws a distinction between the two orders in that Pearson involved specific instructions to consider the merits, whereas here this Court was instructed to consider Petitioner's "constitutional claims" – and such consideration can result in a conclusion that they are defaulted for reasons other than those specifically addressed by the Eighth Circuit.

The Court believes that its preliminary view remains correct. For that reason, the Court holds that all claims held to be defaulted for reasons other than the one reversed by the Eighth Circuit are still defaulted. In the interest of brevity, the Court incorporates the discussion from Parts II(A) (actual

innocence not grounds for excusing default). II(B) (ineffective assistance of post-conviction counsel not grounds for excusing default), and II(D) (violation of state pleading requirements adequate grounds for finding default) of the December 4, 1998 Order herein as set forth verbatim.

II. DISCUSSION

The Court will consider the issues Petitioner has raised in the same order and with the same headings as they were discussed in the December 4, 1998 Order.

A. Ineffective Assistance of Trial Counsel: Voir Dire, Part I

Petitioner contends that his trial counsel was ineffective based on his performance during voir dire. In summary, Petitioner complains that trial counsel allowed the prosecutor to "completely dominate the voir dire" and asked very few questions. As a result, trial counsel allegedly missed opportunities to (1) ferret out grounds for challenging jurors for cause or to rehabilitate them in the face of the prosecutor's challenges and (2) educate the jury about the death penalty and Petitioner's theory of defense. Petitioner does not contend that his jury was biased; instead, he argues that he was prejudiced because the jury that decided his case was "prosecution oriented."

One aspect of this claim was considered and rejected on the merits on the December 4, 1998 Order; specifically, Petitioner's claim that trial counsel was ineffective for failing to rehabilitate Venireman Danny Robertson. There appears little doubt that the Eighth Circuit remand order does not require reconsideration of "those claims that the District Court has already addressed on the merits," White, 206 F.3d at 783, so there is no need to address this issue further.

The remaining aspects of this claim lack merit. As the Court indicated in the December 4, 1998 Order.

> the record demonstrates that trial counsel's decision was the product of a conscious decision to avoid overemphasizing the fact that this was a death penalty case. T.Tr. at 7. Petitioner ridicules this tactic, but it is not so absurd as to violate trial counsel's constitutional obligation to provide effective assistance at trial. Furthermore, Petitioner is unable to demonstrate that the composition of his jury would have been any different had trial counsel acted differently. Cf. Kilgore v. Bowersox, 124 F.3d 985, 994 (8th Cir. 1997), cert. denied, 118 S. Ct. 2352 (1998).

Slip op. at 26 n.14. It is this latter point that is most crucial in this context. It must be remembered that Petitioner does not allege that his Sixth Amendment right to a fair and impartial jury was violated, and he does not allege that any of the jurors on the panel should have been struck for cause. Petitioner speculates that his jury was "pro-prosecution," and that further voir dire would have ferreted out this bias. He also speculates that additional questions would have permitted some jurors to be struck for cause.

The Court's ruling is the same as with respect to Venireman Danny Robertson. Petitioner does not challenge the fact that the record provided ample support for removing these jurors for cause, nor does he suggest exactly what he could do to after their opinions. All of the jurors declared that there were no circumstances under which they could vote for the death penalty, and most further declared that they would automatically vote for life imprisonment without parole. The Court is at a loss to understand exactly what trial counsel could have done to cause these potential jurors to retreat from these beliefs.

B. Informing Jurors About the Governor's Power to Pardon

This issue was addressed and denied on the merits in the December 4, 1998 Order, so there is no need to consider it anew.

C. Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection

This claim was also rejected on the merits, so further discussion is not required.

D. Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror

After the Petitioner rested his case in chief, but before final instructions were read, the bailiff brought a matter involving one of the jurors (Ruth Tuggle) to the trial court's attention. The bailiff related her observations in open court with Petitioner (but not the jury) present:

> The juror, Mrs. Tuggle, has expressed her desire to hurry the deliberation. She's asked twice at least in the past 24 hours whether it lasts very long. She several times has discussed murders and brought up the case about Ted Bundy being murdered, and he deserved what he got.
>
> There's some concern as to whether she's really paying attention. She doesn't seem quite with it. The other jurors also feel that maybe she's not, or it's hard communicating with her.
>
> I've told her the rules of being a sequestered juror, watching TV news, what program[s] she can or can't

> watch, and she just doesn't see[m] to be able to follow those instructions.

T.Tr. at 1026. Petitioner's counsel then asked Petitioner whether it was his desire to keep Tuggle on the jury, and he declared it was. T.Tr. at 1026.

Petitioner now contends that his attorney was constitutionally ineffective for failing to seek Tuggle's removal. This claim of ineffective assistance was not presented in either his pro se 29.15 Motion or the First Amended 29.15 Motion, nor was it raised on appeal to the Missouri Supreme Court. It was raised in the Second Amended 29.15 Motion, where the claim was described as follows:

> Defense counsel failed to move to strike Juror No. 58, Ruth Tuggle, once it became apparent that Juror Tuggle had violated the court's order to not discuss the case among the other jurors or follow instructions given by the bailiff in the case (TR. 1026).

Second Amended 29.15 Motion at 7 (Legal File at 41).

The Amended Petition in this case focuses on Juror Tuggle's "desire to hurry the deliberations," her discussion of "various other murders with other jurors and specifically. . .the case of Ted Bundy and his execution," the concern among jurors as to whether Ms. Tuggle was paying attention, and whether she was in full possession of her mental faculties," and the bailiff's concern that she "doesn't seem to be able to follow . . . instructions." Amended Petition, ¶¶ 77-79. At no time, in either the Second Amended 29.15 Motion or the Amended Petition, did Petitioner suggest that counsel should have sought Juror Tuggle's removal because she was biased, or that trial counsel rejected the trial judge's invitation to remove her. On remand, Petitioner now contends that counsel was ineffective

for (1) failing to accept the trial court's offer to remove Juror Tuggle, and (2) failing to seek removal of Juror Tuggle because she was biased. The Court rejects all argument that have been raised.

The claim that counsel refused to accept the trial court's invitation to excuse Juror Tuggle was defaulted. Even if one considers the argument raised in the Second Amended 29.15 Motion, this argument was not presented to the state courts. In addition, the claim was not presented in the Amended Petition in this case; whatever, the scope of remand may be, it does not permit Petitioner to add new claims. Finally, and most importantly, the argument relies on a faulty premise - the transcript does not reveal that the trial judge would have excused her if Petitioner made the request. Review of the transcript reveals that the matter had been discussed between the attorneys for both sides and between Petitioner and his attorney, and a plan of action mapped out, before the record was made. Tr. at 1025, lines 1-18. Clearly, a decision had been reached before the judge was summoned. Petitioner was asked, by his trial attorney and not the judge, "is it your decision to keep her on the jury?" Petitioner answered in the affirmative. Tr. at 1026. At no time did the judge declare that he would remove Juror Tuggle if asked, so counsel could not have been ineffective for failing to accept the offer.

The claim that counsel should have argued Juror Tuggle was biased was also procedurally defaulted because it was not included in the Second Amended Petition. It also was not advanced in the Amended Petition in this case. Moreover, the Court does not believe that Juror Tuggle was removable for this reason. The outcome might be different had she expressed these views before trial, but she made these statements after Petitioner rested.

Finally, the Court holds that the trial court was not obligated to remove Juror Tuggle for misconduct. The bailiff did not report that Ms. Tuggle was watching the news or reading the newspapers, and the fact that she knew about the fate of one of the most notorious serial murderers in this country is not grounds for her removal. Although she was discussing the case before final instructions were read, the Court does not believe this would have required her removal. A discussion of the case with fellow jurors after the evidence is in the sort of "minor misconduct" that a trial court would have the discretion to decide does not warrant removal.

E. Right to Fair and Impartial Jury

Relying on the circumstances discussed in Part II.D, Petitioner contends that allowing Tuggle to remain on the jury violated his right to a fair and impartial jury. Tuggle's inclusion on the jury was not objected to at trial and was not raised on direct appeal and therefore has been defaulted, and the Eighth Circuit's remand does not affect this conclusion. Petitioner cannot rely on his attorney's failure to object as cause and prejudice to excuse this default because, as discussed in Part II.D, Petitioner did not present the state courts with a claim that his attorney should have alleged juror bias. See Oxford v. Delo, 59 F.3d 741, 747 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996) ("the performance of trial counsel is irrelevant to the cause [and prejudice] inquiry where the petitioner fails to raise the ineffective assistance of trial counsel claim in state court proceedings."). Moreover, as discussed in the previous section, the record demonstrates that Juror Tuggle became "biased against Petitioner" after she heard of all the evidence; this is not a constitutional violation.

F. Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause

The merits of this issue were addressed in the December 4, 1998 Order and were affirmed on appeal. White, 206 F.3d at 781-82. Further discussion is not required.

G. Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror

During the small-group voir dire, Venirewoman Brison (who was number 33 on the panel) discussed her concerns and hesitations about voting in favor of the death penalty. T.Tr. at 276-77, 284. The prosecutor's motion to strike her for cause was denied. T.Tr. at 289-91. Petitioner contends that the prosecutor "slipped" her onto a list of jurors who had been removed for cause, and his trial counsel's failure to remedy this error constituted ineffective assistance of counsel.

This claim of ineffective assistance was not presented in the Second Amended 29.15 motion (as observed in the December 4, 1998 Order at 33 n.16) and for that reason remains defaulted notwithstanding the Eight Circuit's decision. The December 4, 1998 Order includes an alternative holding, rejecting the claim on the merits. The scope of remand does not require the Court to revisit issues that were addressed on the merits, and for that additional reason the Court concludes that further discussion is not warranted.

H. Ineffective Assistance of Trial Counsel: Voir Dire, Part II

Petitioner contends that during the death penalty portion of voir dire, his trial counsel "did not conduct any questioning about jurors' views on the death penalty. He did not ask if there were jurors who would automatically impose the death penalty. He did not attempt to rehabilitate jurors who had reservations about the death penalty." Petitioner's Supplemental Brief on Remand at 65. The prosecutor asked the prospective jurors

whether they could "realistically consider" both punishments, which elicited the jurors' views on the subject. The prosecutor followed up with additional questions when appropriate, including particularly whenever an answer indicated inability to consider both punishments. The Court does not discern (and Petitioner does not identify) any prejudice from trial counsel's failure to follow up with a virtually identical question. Petitioner's argument regarding the failure to attempt rehabilitation is the same argument advanced in Part II.E and is rejected for the same reason.

Petitioner also faults trial counsel for failing to "ask jurors any questions about issues that were going to arise in the case such as witness identification and misidentification, graphic photographic evidence, children as victims and witnesses, and drug use." Id. Questions designed to elicit views about drug use were asked during general voir dire. Tr. at 52-71. The issue was also discussed during individual voir dire. Petitioner does not suggest what more trial counsel should have done, nor does he explain how the failure to do more resulted in prejudice. There could be no deficient performance under Strickland for failure to discuss children as victims because none of the three victims were children; the children were witnesses. With respect to the remaining issues, even if one assumes the failure to raise these topics in voir dire constituted deficient performance, Petitioner's claim of prejudice is purely speculative.

I. Ineffective Assistance of Trial Counsel:
Failure to Investigate and Introduce Evidence of Innocence

This claim was procedurally defaulted. The issue is not raised in the Second Amended 29.15 Motion. Some, but not all, aspects of this claim were raised in the First Amended 29.15 Motion; those that were not have never been presented to the Missouri courts and for that reason are defaulted. Those that

were presented in the First Amended 29.15 Motion were addressed by the trial court, but were not raised on appeal to the Missouri Supreme Court. see Respondent's Exhibits F. S. and CC (Petitioner's Briefs filed with the Missouri Supreme Court) and for that reason those claims were defaulted. See generally O'Sullivan v. Boerckel, 526 U.S. 838 (1999).

J. Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence

This claim was not presented to the state courts at any time, including in the Second Amended 29.15 Motion. The claim has been defaulted.

K. Eighth Amendment Violation: Lack of Mitigating Evidence

This claim was not included in the Second Amended 29.15 motion and was procedurally defaulted. In addition, the Court's December 4, 1998 Order included an alternative holding on the merits, and the mandate does not direct this Court to reconsider issues previously addressed on the merits. For both of these reasons, further discussion is not warranted.

L. Trial Counsel's Conflict of Interest

The merits of this issue were addressed in the December 4, 1998 Order and were affirmed on appeal. White, 206 F.3d at 782-83. Further discussion is not required.

M. Ineffectiveness of Appellate Counsel: Myriad of Claims

The Court's December 4, 1998 Order rejected this claim on the merits, holding that the claim was not cognizable. Further discussion is not required.

N. Due Process Violation: Abandonment by Post-Conviction Counsel

This issue was disposed of on the merits in the December 4. 1998 Order, so further discussion is not required.

O. Due Process: Pleadings Requirements

This issue focused primarily on the Missouri Supreme Court's determination that his First Amended 29.15 Motion was insufficient under state law to secure him a hearing. The December 4, 1998 Order addressed the merits (by incorporating the earlier discussion in Part II.D of that Order), so further discussion is not required.

P. Due Process: Rule 29.15's Deadlines

This claim was previously rejected on the merits.

Q. Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams

This issue was not raised in the Second Amended 29.15 Motion or at any other time in the Missouri Courts, so it remains defaulted. In addition, the December 4, 1998 Order observed that the claim lacked merit because Williams' affidavit indicated she had spoken to trial counsel. For both of these reasons, further discussions are not warranted.

R. Ineffective Assistance of Trial Counsel: Failure to Give an Opening Statement at the Beginning of Trial

This claim was not presented to the state courts at any time, including in the Second Amended 29.15 Motion, and for that reason has been defaulted. In any event, the Court holds that

whether opening statement should be made at the beginning of trial or immediately before the defendant presents his case in chief is a classic example of a strategic decision that cannot be second-guessed under Strickland.

S. Ineffective Assistance of Trial Counsel: Failure to Hire an Expert

Petitioner contends his trial counsel was ineffective for failing to hire an expert to testify that those who use crack cocaine - such as Kinney and Black - suffer damage to their ability to perceive and remember events. The issue was raised in Petitioner's pro se 29.15 Motion (as Ground S), but was not raised in either the First Amended 29.15 Motion or the Second Amended 29.15 Motion. The Missouri Supreme Court held that the claim was not properly pleaded and that Petitioner did not establish what the expert's testimony would have been. White v. State, 939 S.W.2d 887, 898 (Mo.) (en banc), cert. denied 522 U.S. 948 (1997); see also Judgment dated August 30, 1995, at 3 (trial court's rejection of this issue).

In Part II.D of the December 4, 1998 Order, the Court held that violation of Missouri's pleading rules constituted a procedural requirement, and claims dismissed for failure to obey those rules were defaulted. The Eight Circuit declared that its holding "makes it unnecessary to consider the adequacy of the state pleading rules held to bar most of the claims in the first amended petition." White, 206 F.3d at 780 n.4. The state pleading rules are relevant to this issue because this issue was not raised in the Second Amended 29.15 Motion that the Court of Appeals has instructed the Court to consider. The only place it is raised is in the pro se motion, and there it is raised in a manner that does not comply with the state pleading rules. The Court incorporates its discussion from Part II.D of the December 4, 1998 Order and reaffirms its conclusion that the claim has been defaulted.

T. Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances

The Court held this issue to be defaulted and, as an alternative holding, rejected the claim on the merits. Consequently, this claim does not need to be re-examined on remand.

U. Ineffective Assistance of Trial Counsel: Failure to Object to the Videotaped Lineup

In this claim, Petitioner contends he was in jail awaiting trial on an unrelated robbery charge when he was placed in a videotaped lineup. He alleges that his attorney in the robbery case was not contacted prior to the lineup, and his trial counsel in this case was ineffective for failing to object to the use of the lineup for this reason. This claim was not presented to the state courts in any pleading (including the Second Amended 29.15 Motion) and remains defaulted; in addition, the Court incorporated the subsequent discussion in Part IV.Z and noted that the claim lacked merit because Moore v. Illinois, 434 U.S. 220, 224, 227 (1977) does not require the presence of counsel when a person is shown in a videotaped lineup. This issue need not be discussed further for the independent reasons that (1) the claim was defaulted, and the Eighth Circuit's decision does not alter that conclusion, and (2) this Court previously addressed the merits, and the Eighth Circuit declared that issues previously addressed on the merits need not be addressed again.

V. Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson

This claim was not included in the Second Amended 29.15 Motion (or in any other pleading filed in state court), and for that reason has been defaulted.

W. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Use of Peremptory Challenges and Certain Strikes for Cause

Petitioner contends that the prosecutor utilized peremptory challenges to eliminate five jurors who had "conscientious scruples" against the death penalty and six jurors who expressed difficulty believing witnesses who used illegal drugs. He also claims that his trial counsel failed to object to two of the prosecutor's requests to strike jurors for cause.

The first aspect of this claim was addressed on the merits when the Court held that it was barred by Teague v. Lane, 489 U.S. 288, 316 (1989). The second aspect is clearly lacking in merit. Venireman Heman agreed that he did not know if he "could be fair to both the State and the defendant" because of his views regarding drugs. Tr. at 333. There is no indication as to what counsel should have done, and agreeing to strike Mr. Heman for cause was reasonable given that the murder was related to a drug transaction and the jurors would be assessing the penalty if Petitioner was found guilty. In addition to her views about drugs, Venirewoman Meysenburg declared that she did "not take stress very well" and was suffering from a migraine headache after just one day of the jury selection process. Tr. at 370-71. She also revealed that she would "probably" vote automatically for life without parole if Defendant were found guilty. Tr. at 369. It is not clear whether the basis for the strike for cause was Ms. Meysenburg's views regarding drugs, her inability to consider the death penalty, or her health, Tr. at 384; regardless, the record reveals that the strike for cause was appropriate so failing to object was not ineffective assistance.

X. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Closing Argument During Penalty Phase

Petitioner argues that various aspects of the prosecutor's closing argument during the penalty phase were improper, and trial counsel was ineffective for failing to object. This claim was raised in the First Amended 29.15 Motion, where trial counsel was described as failing "to object to all aspects of the State's penalty phase argument since at no time was the argument directed to those aspects of this crime or this Movant which would justify a sentence of death." First Amended 29.15 Motion, ¶2(J) (emphasis in original). The Missouri Supreme Court held the claim was defaulted because it was not pleaded with sufficient particularly. White, 939 S.W.2d at 902.

The Second Amended 29.15 Motion contains greater particularly, identifying six specific statements from the prosecutor's argument that he alleged to be improper. Second Amended 29.15 Motion ¶2(u). In this Amended Petition in this Court, Petitioner identified a total of ten allegedly improper comments. Those comments that were not presented in the Second Amended 29.15 Motion were not brought to the state courts' attention at any time, and for that reason cannot form the basis for relief.

"The test for prosecutorial misconduct has two parts. First, the remarks must have been improper, and second, the remarks must have been so prejudicial as to deprive the defendant of a fair trial." Young v. Bowersox, 161 F.3d 1159, 1162 (8th Cir. 1998), cert. denied, 528 U.S. 880 (1999). Needless to say, if the remarks were not improper, there is no unfair prejudice to be gauged and the second component of the analysis is unnecessary. However, in the event an improper comment is revealed, it must be remembered that the standard of prejudice is relatively high. "The petitioner must show that the alleged improprieties were 'so egregious that they fatally infected the proceedings and rendered his entire trial fundamentally unfair.' Moore v. Wyrick, 760 F.2d 884, 886 (8th Cir. 1985). Under this

standard, a petitioner must show that there is a reasonable probability that the error complained of affected the outcome of the trial - - e.e., that absent the alleged impropriety, the verdict probably would have been different." Newton v. Armontrout, 885 F.2d 1328, 1336-37 (8th Cir. 1989), cert. denied, 497 U.S. 1038 (1990) (second quotation omitted); see also Darden v. Wainright, 477U.S. 168, 181 (1986). In evaluating the potential for prejudice, the Court must consider "(1) the type of prejudice that arose from the remark; (2) whether defense counsel did anything in his argument to minimize the prejudice; (3) whether the jury was properly instructed; and (4) whether there is a reasonable probability that the outcome of the [proceeding] would have been different ..." Young 161 F.3d at 1162. With regard to the third element, the fact that the jury was generally instructed that arguments of counsel are not evidence is insufficient to thwart a showing of prejudice. E.g., Antwine v. Delo, 54 F.3d 1357, 1364 (8th Cir. 1995), cert. denied, 516 U.S. 1067 (1996); Newlon, 885 F.2d at 1337. With these dictates in mind, the alleged instances of misconduct presented in the Second Amended Rule 29.15 Motion can be considered.

1. In broaching this theory that Don Wright was killed as part of an effort to eliminate witness, the prosecutor said

> "[f]or the first time we get to explain to [Petitioner] and show him that he's left us with no choice. There's only one punishment, and that's that the pay the ultimate penalty for this ultimate crime. Leamon White must be sentenced to death.

Supplemental Tr. at 35. In context, this statement does not declare that the jury must vote to impose the death penalty, but rather legitimately expresses the prosecutor's view that the penalty should be imposed because Wright was killed to prevent any witnesses from identifying Petitioner.

2. While explaining the need for the jury to consider the existence of aggravating factors, the prosecutor said

> During voir dire, because you hadn't heard the evidence, because we can't talk about what's going to go on in this stage, I couldn't tell you, "You're going to find him guilty," and because of the nature of this case aggravating circumstances are automatic. But you have to find them. And your jury foremen will have to write out the exact language that is contained in these instructions.

Id. at 36. Petitioner contends that this statement "impl[ied] that if the jury found any aggravating circumstance, they had to impose death." Amended Petitioner, ¶ 212(b). This is not a proper characterization of the statement. Considering the text, the message conveyed is that in finding Petitioner guilty of first degree murder and thereby agreeing with the prosecutor's theory of the case, they had already essentially found some of the aggravating factors to exist. The statement could also be understood as referring to the aggravating circumstance based on Petitioner's prior convictions; a finding on this point, given the nature of the evidence, could also be characterized as "automatic." Regardless, the topic being discussed is the existence of aggravating circumstances, and the statement does not suggest that the imposition of the death penalty itself is automatic.

3. The prosecutor argued that the jury could consider the deterrent effect of the death penalty. Petitioner has not explained why this argument is improper, and at least three Courts of appeal have held the argument is not improper. Lesko v. Lehman, 925 F.2d 1527, 1545 (3d Cir.), cert. denied, 502 U.S. 898 (1991); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986), cert. denied, 482 U.S. 909 (1987); Drake v. Kemp,

762 F.2d 1449, 1458 (11th Cir. 1985) (en banc), cert denied, 478 U.S. 1020 (1986).

4. In an argument similar to the preceding one, Petitioner faults the prosecutor for arguing that the death penalty serves as retribution. The allegation of error is rejected for the reasons previously expressed.

5. The prosecutor asked the jury to consider the gruesomeness of the crime. Supplemental Tr. at 42, 44. This argument was not improper because one of the statutory aggravating factors submitted for the jury's consideration was whether the murder was "outrageously or wantonly vile, horrible, or inhumane." All the prosecutor did was ask the jury to consider the available evidence on this issue.

6. In the rebuttal portion of the closing argument, the prosecutor told the jury that "anybody along the way, if they don't do their job, then Leamon White wins." Supplemental Tr. at 45. Petitioner argues that this statement "lessened the jurors' sense of responsibility for imposition of the death penalty," Amended Petition, ¶ 212(l), but does not explain this assertion. The Court holds the comment is too nebulous to have much impact, and it is certainly to insubstantial to have resulted in any prejudice.

Y. Ineffective Assistance of Appellate counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver

This claim was disposed of on the merits in the December 4, 1998 Order, so further discussions is not required.

Z. Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's In-Court Identification of Petitioner

This claim was disposed of on the merits in the December 4, 1998 Order, so further discussion is not required.

AA. Actual Innocence

In this claim, Petitioner argued that this actual innocence of the crime justified issuance of the writ. The claim was considered and rejected on the merits, so re-examination on remand is not appropriate.

BB. Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer

This claim was never presented to the state courts in any form, so it has been, and remains, procedurally defaulted.

CC. Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel

This claim was not presented in the Second Amended 29.15 Motion. In addition the December 4, 1998 includes an alternative holding, rejecting the claim on the merits. For these reasons, the claim is rejected.

DD. Judicial Bias During Post-Conviction Proceedings, Part I

This Court's rejection of the issue was affirmed by the Eighth Circuit. White, 206 F.3d at 783.

EE. Judicial Bias During Trial

This claim of trial error was not raised on direct appeal to the Missouri Supreme Court and thereby was procedurally defaulted. The default could not be excused even if the claim

was included in the Second Amended Rule 29.15 Motion – which it was not. This claim has been defaulted, and there is no basis for excusing the default.

FF. Judicial Bias During Post-Conviction Proceedings, Part II

This argument was disposed of on the merits in the December 4, 1998 Order. In addition, the issue is very similar to the one discussed in Part II.DD herein (Part IV.DD in the December 4, 1998 Order), and the ruling on that issues was affirmed on appeal.

GG. Ineffective Assistance of Trial Counsel: "Bad Loser" Comment

The December 4, 1998 Order includes an alternative holding, rejecting this claim on the merits because the jurors who heard the comment were not on the jury and their jury numbers were too high to provide them with a chance to be on the panel; thus, no peremptory challenges were lost. Further discussion is not warranted.

HH. Ineffective Assistance of Post-Conviction Counsel, Part II

This claim was rejected on the merits in the December 4, 1998 Order.

II. Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims

This claim was disposed of on the merits.

JJ. Ineffectiveness of Trial Counsel:

Failure to Request Mistrial During Prosecutor's Closing Argument

This claim was not presented in any of the three post-conviction motions filed by Petitioner or on his behalf – including the Second Amended 29.15 Motion. The claim has been defaulted.

KK. Ineffective Assistance of Appellate Counsel: Failure to Raise Claim Based on *Brady v. Maryland*

This claim was addressed on the merits in the December 4, 1998 Order, so further discussion is not required.

LL. Ineffective Assistance of Appellate Counsel: Verdict Director

This claim was addressed on the merits in the December 4, 1998 Order, so further discussion is not required.

MM. Ineffective Assistance of Post-Conviction Counsel, Part III

This claim was addressed on the merits in the December 4, 1998 Order, so further discussion is not required.

NN. Ineffective Assistance of Trial Counsel: Former Prosecutor as Defense Attorney

Petitioner contends that one of his attorneys (John O'Connor) was Trial Director for the Jackson County Prosecutor's Office when Wright's murder was being investigated and when the indictment in this case was filed. He also speculates that O'Connor "reviewed the case and assigned it to Mr. Hall and Mr. Peters for trial. He also may have been involved in the decision to seek the death penalty." Prior to

jury selection. Duncan asked Petitioner if he understood that O'Connor would be assisting in the case. He also indicated his understanding that O'Connor "until about a year ago was in the Prosecuting Attorney's Office" but that he had not reviewed Petitioner's case during his employment as a prosecutor. T.Tr. at 4-5. Petitioner now contends that O'Connor's status as a former prosecutor constituted ineffective assistance of counsel.

This claim is procedurally defaulted because it was not presented in any of the post-conviction motions. In addition, the portions of the record cited above demonstrate the claim is meritless; O'Connor had no prior involvement with the case, and his prior work for the prosecutor's office does not, in and of itself, constitute ineffective assistance of counsel.

OO. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Opening Statement

This claim was rejected on the merits, so the remand doe not require reconsideration.

PP. Proportionality Review

This claim was rejected on the merits.

QQ. Ineffective Assistance of Trial Counsel: Wasting a Peremptory Strike

Petitioner contends that his trial counsel provided ineffective assistance when he "wasted" a peremptory strike on a prospective juror that had already been struck. This claim was raised in the pro se 29.15 Motion. Pro se 29.15 ¶ 8 (L). The Missouri Supreme Court rejected the claim because Petitioner failed to allege how he had been prejudiced, White III, 939 S.W.2d at 900, which constitutes a procedural default. The issue is raised in the Second Amended 29.15 Motion in

paragraph 2(k), but the infirmity previously identified by the Supreme Court is not corrected therein.

Ultimately, it does not matter whether the claim is still procedurally defaulted because the December 4, 1998 Order includes a detailed discussion of the record and concludes that the juror in question was not going to be struck for cause. This merit-based decision provides and adequate basis for rejecting the claim.

RR. Right to Be Present at Critical Stages

Following his conviction, on March 2, 1989 Petitioner filed a Supplemental Motion for New Trial alleging that one of the jurors (Timothy Williams) "failed to reveal on voir dire examination... that his brother or other relative was a friend of and had gone to school with the victim, Don Wright." Direct Appeal Legal File at 39. A hearing was held on March 1,[23] but Petitioner did not attend the proceeding. The record contained no reason for his absence. The Motion (along with other post-trial motions) was denied on April 14, 1989.

Petitioner did not raise this issue in his initial appeal. He raised the issue for the first time in his brief in the third appeal to the Missouri Supreme Court. Keeping in mind that Petitioner's direct appeal was disposed of in an earlier appeal,[24] the court observed that "[p]lain error review may be considered 'on appeal.' Rule 84.13(c). This is not an appeal of White's conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the

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[23]There is no explanation as to how the motion was filed the day after the hearing; however, there is no denying the dates as they appear in the legal file and on the Transcript.

[24]The reader is referred to Part I.B of the December 4, 1998 Order for a more-complete description of this case's odyssey through the state courts.

post-conviction court 'clearly erred' in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible." White III, 939 S.W.2d at 904.[25] Consequently, the claim has been procedurally defaulted.

SS. Ineffective Assistance of Trial Counsel: Myriad of Claims

Within this single claim, Petitioner asserts several claims of ineffective assistance of trial counsel. He contends his attorney was ineffective for (1) failing to elicit helpful testimony from Ben Kinney, (2) failing to challenge suggestive pretrial identification procedures, (3) failing to effectively impeach Ernest Black and Carol Kinney, (4) failing to prepare for trial, and (5) eliciting a positive identification of Petitioner from Ernest Black. The Missouri Supreme Court held that Petitioner failed to satisfy the state court's pleading requirements for proper presentation of the first four claims, see White, 939 S.W.2d at 895-97, so they were deemed defaulted. The fifth claim was addressed by this Court on the merits in the December 4, 1998 Order, so further discussion is not required.

The Second Amended 29.15 Motion does not mention the claim regarding Ben Kinney or the impeachment of Ernest Black and Carol Kinney, so consideration of that pleading cannot cure the procedural default previously identified by the Missouri Supreme Court. That court also found that the record demonstrated no prejudice from the manner in which the cross examination of the latter two witnesses was conducted because Petitioner "provide[d] no factual basis for a finding of either

[25]The Missouri Supreme Court also "assume[d] that the issue is raised as a motion to recall the mandate" and considered whether appellate counsel provided ineffective assistance for failing to raise the issue. White III, 939 S.W.2d at 904. Petitioner has not raised this issue in this forum, so there is no need to address it.

inadequate representation or prejudice under the *Strickland* test." Id. at 897. The claim was also rejected on the merits because "the record refutes [Petitioner's] claim that his attorneys failed to impeach Carol Kinney and Ernest Black with prior inconsistent statements." Id. at 895-96, 898. These factual findings are entitled to deference, and Petitioner has not satisfied the heavy burden required to justify interposing this Court's judgment for that of the state courts.

This leaves only the issue regarding the pretrial identification. Unlike the other claims, this one is discussed in detail in the Second Amended 29.15 Motion. See paragraph 2(l) – but only as it relates to Ernest Black's identification.[26] The Court holds that it provides sufficient detail to have permitted meaningful consideration by the Missouri courts, but the claim is rejected for two reasons.

First, Petitioner has not pursued this claim on remand. This issue is raised, along with several others, in Claim 45 of the Amended Petition. Claim 45 is addressed in Part III.A of Petitioner's Supplemental Brief on issues to be Considered on Remand. However, this aspect of Claim 45 is not raised.

Second, it lacks merit. In September 1987, Black was shown approximately four videotaped lineups; he failed to make a positive identification. Tr. at 880. The weekend before trial – approximately sixteen months later – Black was shown two of those same lineups. Tr. at 880-81. Petitioner' s

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[26]The Amended Petition filed in this Court also discusses an identification made by Carol Kinney. This claim was not raised in the Second Amended 29.15 Motion, nor was it presented to the state courts at any other time. In any event, the Court previously observed that the factual predicate for this claim is not present. See December 4, 1998 Order at 15 ("Detective Gibson had not shown Kinney Petitioner's picture, T.Tr. at 759, 782-83 - in fact, up to this point in time he did not even know that the police *had* Petitioner's picture. T.Tr. at 771-72.").

attorneys were not contacted prior to the January 1989 viewing, nor were they present for it. The next Monday – the day trial started – one of Petitioner's attorneys was told that Black had identified the third man in the lineup as the second man at Kinney's house, but counsel misinterpreted the information to mean that Black had identified the third man at Kinney's house. The third man at Kinney's house was fairly well established as being Cleveland Ford. When counsel's misunderstanding came to light on the Saturday of trial[27] Petitioner's counsel objected on the basis of the lateness of the disclosure, but the trial court held that the objection was untimely. Tr. at 881-86. Black denied receiving any information about the individuals in the videotapes prior to viewing them in January 1989. Tr. at 886. He also denied remembering whether the videotapes he saw immediately before trial were shown to him in September 1987. Tr. at 954.

The Second Amended 29.15 Motion raises five specific arguments regarding Black's pretrial identification, and these are the only issues that are not procedurally defaulted:

1. The identification was sought too close in time to trial to permit timely disclosure to Petitioner's attorneys,
2. The late notice prejudiced the trial strategy,
3. The lineup was suggestive because it "was conducted two years after the crime and after Mr. Black had seen photographs and previous lineups of the defendant without making any identification,"
4. The lineup was administered after Petitioner was indicted, but Petitioner's attorneys were not contacted in violation of the Sixth Amendment, and
5. The prosecution did not clearly identify the substance of Black's identification on the Monday of trial.

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[27]This is not a misprint; the transcript reflects that trial proceedings occurred on February 4, 1989, which was a Saturday.

These objections are not meritorious, so counsel was not ineffective for failing to make them. Petitioner cites no legal grounds for supporting the first two. The passage of time between an event and a pretrial identification does not demonstrate suggestiveness; at best, it provides grounds for impeachment, and trial counsel did not impeach Black on this point. Tr. at 892-94; 951-52. The Sixth Amendment did not require the presence of counsel because the lineup was on videotape. Moore, 434 U.S. at 224, 227. The fifth issue specified is not a legal objection.

TT. Conflict of Interest, Etc.

In an argument very similar to the one presented in Part II.L, supra – which was affirmed on direct appeal – Petitioner contends that his attorney "was ineffective and had a conflict of interest" as demonstrated by his asking Petitioner to endorse strategic decisions in open court. The ineffective assistance aspect of this claim was addressed in Part II.L; in the December 4, 1998 Order, the Court applied the same analysis to reject this claim on the merits. This claim does not require further discussion.

UU. Restriction on Cross Examination of Kinney -

The merits of this claim were addressed in the December 4, 1998, Order, so further discussion is not required.

VV. Cumulative Error of Trial Counsel

The merits of this claim were addressed in the December 4, 1998 Order, so further discussion is not required.

WW. Cumulative Error (Generally)

The merits of this claim were addressed in the December 4, 1998 Order, so further discussion is not required.

III. CONCLUSION

For the foregoing reasons, the Amended Petition for Writ of Habeas Corpus is denied.

IT IS SO ORDERED.

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
DATE: 4/3/01
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1660WM

Leamon White,	*	
	*	
Appellant,	*	
	*	
v.	*	**On Appeal from the**
	*	**United States District**
Michael S. Bowersox,	*	**Court for the Western**
Superintendent,	*	**District of Missouri**
	*	
Appellee.	*	

Submitted: December 13, 1999
Resubmitted on Supplemental Briefs: February 10, 2000
Filed: March 14, 2000

Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and MELLOY,[1] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Leamon White appeals the denial of his petition for a writ of habeas corpus. The District Court held that all of Mr. White's claims were procedurally barred, except those adequately raised by his first amended post-conviction motion in the state courts.

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[1] The Hon. Michael J. Melloy, United States District Judge for the Northern District of Iowa, sitting by designation.

We reverse and remand for further proceedings on the merits of those claims the District Court held to be procedurally barred. We hold that the state procedural rule that barred Mr. White's second amended motion was inadequate to bar federal consideration of these claims. We affirm the remaining portion of the District Court's judgment. We agree with that Court that the claims it found open on federal habeas are without merit.

I.

Mr. White was tried and convicted of first degree murder. He was sentenced to death. Mr. White appealed to the Missouri Supreme Court, which ultimately affirmed his conviction. While Mr. White's direct appeal was proceeding, he filed a pro se motion in the Circuit Court of Jackson County, Missouri, for post-conviction relief. Mr. White's post-conviction motion became entangled in procedural difficulties because his court-appointed attorneys failed to file a timely amended motion on his behalf. Under Missouri law, this failure constituted "abandonment," and Mr. White was owed some remedy for his attorneys' failures. As a remedy, the Missouri courts treated as timely the first, but not the second, of two untimely motions filed by Mr. White's attorneys. They limited the remedy to the first motion on the ground that Mr. White had improperly signed a "blank verification." The predominant issue on appeal is whether the procedural rule barring the second motion was an adequate state ground. This issue is practically determinative of Mr. White's habeas petition because almost all of the claims raised in the first motion, which was hastily drafted, were procedurally defaulted due to inadequate fact pleading.

On August 17, 1989, Mr. White filed his pro se motion for post-conviction relief in the Circuit Court pursuant to Mo. R. Crim. P. 29.15. On September 25, 1989, the Court appointed the Missouri Public Defender's Office to represent Mr. White in post-conviction proceedings. Under the Rule, counsel has a duty

to file an amended motion if, after consulting with the movant, there appear to be grounds for doing so. Just five days before the amended motion was due, the Missouri Public Defender's Office assigned an attorney, Larry Pace, to represent Mr. White.

On October 20, 1989, Mr. Pace entered his appearance. He moved for and was granted an extension, until November 23, 1989, to file an amended motion. Under Rule 29.15, this was the only extension allowed. On November 9, 1989, fourteen days before the amended motion had to be filed, Mr. Pace improperly withdrew from the case without permission of the Court. It is now undisputed that this constituted abandonment under Missouri law. The Public Defender's Office replaced him with a second attorney, Joe Locascio. At that time, Mr. Pace had not yet begun to write an amended motion, had not secured the files of Mr. White's trial attorneys, and had not met with Mr. White.

Five days later and nine days before the final deadline, Mr. Locascio met with Mr. White to discuss his post-conviction motion. This was Mr. White's first meeting with any attorney to discuss his post-conviction motion. While at the prison, Mr. Locascio had Mr. White sign a "blank" verification, to be added to the amended motion once it was written.[2] Mr. Locascio did this because Rule 29.15 motions are void unless verified by the movant. With time so short, he felt there would be no opportunity to obtain the verification properly after the motion was written.

Despite this short-cut with the verification, Mr. Locascio missed the November 23, 1989, deadline for filing Mr. White's amended motion. As the Supreme Court of Missouri later held,

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[2]Mo. R. Crim. P. 29.15 provides: "The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion."

this constituted a second instance of abandonment under Missouri law. On November 27, 1989, Mr. Locascio filed the amended motion, four days late, and a separate motion for a thirty-day extension to file a second amended motion. Although the Circuit Court lacked the jurisdiction to do so, it granted leave to file a second motion and an extension until January 9, 1990. Mr. Locascio filed a second amended motion on January 8, 1990. Because the Court lacked jurisdiction to grant the extension, this motion was later ruled untimely. On August 1, 1990, the Circuit Court denied relief on all of Mr. White's post-conviction motions.

On appeal, the Missouri Supreme Court reversed and remanded for a determination of whether Mr. White's first and second attorneys had abandoned him. White v. State, 813 S.W.2d 862 (Mo. 1991) (en banc) ("White I"). Under Rule 29.15, it was the duty of appointed counsel to determine whether sufficient facts were asserted in the pro se motion to support the claims that it raised; to determine whether the movant had included in the pro se motion all claims for post-conviction relief known to the movant; and to correct any deficiencies in the pro se motion by filing an amended motion. Although there was no right to effective assistance of post-conviction counsel, Missouri provided a remedy, as a matter of state law, where appointed counsel "abandoned" his client by completely failing to perform these statutory duties. Luleff v. State, 807 S.W.2d 495 (Mo. 1991) (en banc). The Missouri Supreme Court, therefore, remanded for determination of whether Mr. White's first and second attorneys had abandoned him by withdrawing without leave of court, by failing to file a timely amended motion, and by failing to obtain a proper verification of the amended motion. On remand, the Circuit Court found no abandonment, but it was again reversed on appeal to the Missouri Supreme Court.

The Missouri Supreme Court found abandonment but provided only a limited remedy because Mr. White had signed the "blank" verification. White v. State, 873 S.W.2d 590 (Mo. 1994) (en banc) ("White II"). The Missouri Supreme Court held that Mr. White had been abandoned when his first attorney withdrew without court permission. This constituted abandonment because Mr. White's "second counsel did not have enough time to file a timely amended motion after he entered his appearance." Id. at 597. Additionally, the Court found that Mr. White had been abandoned when his second attorney failed to file a timely amended motion.[3] The Court found that "no action or inaction by [Mr. White] contributed to the delayed filing." Ibid.

As a remedy, the Missouri Supreme Court forgave the untimely filing of the first amended motion. The Court, however, refused to apply this remedy to the second amended motion. The Court reasoned, first, that Mr. White had been abandoned only with respect to the timing of the first amended motion, not with respect to its content. Second, the Court considered that Mr. White had waived any claim that the first amended motion was incomplete when he signed the "blank" verification: "By signing the verification in blank, defendant knew or should have known that he was an active participant in falsely verifying a document that had not yet been written." Id. at 595.

The Missouri Supreme Court remanded to the Circuit Court for consideration only of those claims made in Mr. White's first amended motion. The Circuit Court denied all of Mr. White's claims. On appeal, the Missouri Supreme Court affirmed. White v. State, 939 S.W.2d 887 (Mo. 1997) (en banc) ("White III"). The Missouri Supreme Court addressed only six of Mr. White's

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[3]The Missouri Supreme Court also requested an investigation by Missouri's Chief Disciplinary Counsel to determine whether any ethical rules had been broken by the Public Defender's Office or the two attorneys.

twenty-eight claims on the merits. The Court held that the rest of Mr. White's claims were procedurally defaulted due to the inadequate pleading of the first amended motion. Specifically, the Court found that in twenty-two of his claims, Mr. White had failed to plead sufficient facts to warrant relief.[4]

On December 26, 1997, Mr. White filed his petition for a writ of habeas corpus in the District Court. The Court held that the Missouri Supreme Court's rejection of the second amended motion was based on an independent and adequate state ground. Likewise, the Court held that Missouri's fact-pleading requirement was an independent and adequate state ground. Accordingly, the District Court found that all of Mr. White's claims were procedurally barred, except those six claims that the Missouri Supreme Court had found adequately raised in the first amended motion. On these six claims, the District Court ruled against Mr. White on the merits. Three of these claims have been appealed, along with the District Court's ruling on procedural bar.

II.

Federal review of a habeas petition is barred when a state court dismisses or rejects a prisoner's claims on independent and adequate state grounds unless a petitioner can demonstrate either (1) cause and prejudice or (2) actual innocence. Coleman v. Thompson, 501 U.S. 722, 750 (1991). Procedural default on a claim under state law may constitute an independent and adequate state ground, Harris v. Reed, 489 U.S. 255, 262 (1989), but only if the state procedural rule is firmly established, regularly followed, and readily ascertainable. Ford

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[4]Our holding that consideration of the second amended petition was not barred by an adequate state procedural ground makes it unnecessary to consider the adequacy of the state pleading rules held to bar most of the claims in the first amended petition. We likewise need not consider petitioner's assertion that his actual innocence excuses any procedural default.

v. Georgia, 498 U.S. 411, 423-4 (1991). The underlying principle is "that failure to follow state procedures will warrant withdrawal of a federal remedy only if those procedures provided the habeas petitioner with a fair opportunity to seek relief in state court." Easter v. Endell, 37 F.3d 1343, 1347 (8th Cir. 1994). Or, as Justice Holmes expressed it, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." Davis v. Wechsler, 263 U.S. 22, 24 (1923). We believe that Mr. White was denied a fair opportunity to seek relief in this case because the procedural rule that barred his second amended petition was neither firmly established nor readily ascertainable.

The procedural default in this case was based on two limitations of Missouri's remedy for abandonment newly introduced in Mr. White's own case. First, the Missouri Supreme Court held that Mr. White's second amended motion was not entitled to consideration because he had been abandoned only as to the timing of his first amended motion, but not as to its content. At the time of Mr. White's case, the Missouri Supreme Court had just recently decided that there should be a remedy for attorney abandonment in post-conviction proceedings. The Court had stated a general rule that relief was appropriate where the attorney, and not the movant, was responsible for the untimeliness or improper verification of the motion. Mr. White's case, White II, was the first in which the distinction between timing and content was announced and employed to limit the remedy available to an abandoned defendant.

Even in retrospect, the basis for this distinction is unclear to us. The Missouri Supreme Court found that Mr. White's first attorney had abandoned him by leaving his second attorney without time to file a timely motion. We cannot see why such

an abandonment, forcing Mr. White's second attorney to prepare and write a motion in fourteen days, would not include the content of the motion. Mr. White's attorney lacked the time to write a motion because he lacked the time to write its content. With no concern for content, one day would have been sufficient. As confusing as this distinction is in retrospect, we have no trouble finding that neither Mr. White nor his attorneys could reasonably have anticipated any such rule in advance of its first application in Mr. White's own case.

Before White II, the Missouri Supreme Court had held that where abandonment occurred new counsel would be appointed and an extension provided as necessary to file an amended motion. Luleff v. State, 807 S.W.2d 495 (Mo. 1991) (en banc); Bradey v. State, 811 S.W.2d 379 (Mo. 1991) (en banc). In White II, the Missouri Supreme Court stated a new rule limiting the remedy for abandonment. The State of Missouri argues vigorously that this limit was implicit in, and correctly derived from, Missouri's prior precedents. The State's argument, however, is not determinative of the issue before us. Even though a rule appears in retrospect to form part of a consistent pattern of procedures, it should not be applied as a procedural default if the defendant could not be deemed to have been apprised of its existence. Ford v. Georgia, 498 U.S. at 423. The limitation on extensions announced in Mr. White's case is dependent upon the distinction, discussed above, between abandonment as to timeliness and abandonment as to content. For the reasons already discussed, we cannot say that Mr. White was fairly apprised of its existence. Accordingly, even if, as Missouri argues, this rule forms a consistent pattern with prior precedents, we could not apply it as a procedural default in this case.

As a second ground for limiting Mr. White's abandonment remedy, the Missouri Supreme Court held that Mr. White had waived any claim that he had been abandoned as to the content

of the motions when he signed the "blank" verification. This waiver principle was, again, first announced in Mr. White's own case, White II. The Court based this principle on the fact that Mr. White knew or should have known he was an active participant in falsely verifying a document that had not yet been written. The Missouri Supreme Court was flee to interpret its procedural rules in this way. Nevertheless, we do not see how, before the decision in Mr. White's own case, anyone could have known that signing this sort of open-ended verification constituted a waiver of remedies for abandonment.

To begin with, before White II, there was no Missouri precedent relating to the signing of "blank" verifications. Moreover, in White I, the Missouri Supreme Court itself suggested that the blame for the "blank" verification might fall on the second attorney who asked Mr. White to sign it; the Court remanded Mr. White's case to the Circuit Court for a determination of whether the attorney's actions in procuring the improper verification constituted abandonment. In the absence of any precedent, we do not see how Mr. White could have known the legal significance of the improper verification before the Missouri Supreme Court did. In sum, this principle was also neither readily ascertainable nor firmly established at the time of Mr. White's case.

Given the state of the law at the time, Mr. White did not have a fair opportunity to seek relief in this case. Mr. White was presented with a very difficult decision when his attorneys abandoned him: to lose all of his claims in an untimely motion or to sign an improper verification and hope that the motion would be at least timely. The new principles announced by the Missouri Supreme Court in his case were not available to guide him in making that decision. Because these principles were neither readily ascertainable nor firmly established, the procedural default that ensued cannot be considered an adequate state ground to bar federal review.

III.

Mr. White also appeals the District Court's denial of three claims that the District Court found were not procedurally defaulted. First, Mr. White argues that he received ineffective assistance of counsel on his direct appeal. At Mr. White's trial, the Court sustained the prosecutor's motion to strike for cause a venireman, Mr. Layson, over Mr. White's lawyers' objection. The Court had found that Mr. Layson had admitted his bias against the prosecutor; that he was a "loose cannon," likely to share extrajudicial knowledge with other jurors; and that he was a danger to both prosecutor and defendant. Mr. White's attorney failed to argue on direct appeal that Mr. Layson had been improperly removed. Mr. White contends that the trial judge's decision was groundless because Mr. Layson showed no indication of bias. Mr. White concludes, therefore, that failure to raise this "sure" argument on appeal constituted ineffective assistance of counsel.

Largely for the reasons given by the District Court, we reject this argument. Absent contrary evidence, we must assume that Mr. White's appellate counsel failed to raise this claim for reasons of strategy. Roe v. Delo, 160 F.3d 416, 418 (8th Cir. 1998). There is no contrary evidence in this case. We cannot accept Mr. White's argument that Mr. Layson showed no indication of bias and that this would be a successful claim on appeal. According to the record, Mr. Layson indicated that he believed the prosecutor was lying because he failed to mention the possibility of conviction on a lesser offense. Mr. Layson then engaged in an involved disagreement with the trial judge and the prosecutor about the nature of the penalty phase of the trial. Under Missouri law, the trial court has "broad discretion to determine the qualifications of prospective jurors." State v. Parker, 886 S.W.2d 908, 919 (Mo. 1994) (en banc). There were no clear grounds in the record for challenging the trial court's

discretionary determination that Mr. Layson was biased and a "loose cannon," dangerous to both the prosecutor and Mr. White. Mr. Layson's own words support that conclusion.

Second, Mr. White argues that he received ineffective assistance of trial counsel because of his attorneys' conflict of interest. At various points during the trial, Mr. White's attorneys asked him, before the court, to endorse or acknowledge certain decisions made with respect to his defense. Mr. White argues that his attorneys were motivated by a desire to protect themselves from ineffective-assistance-of-counsel claims, and that their questions revealed confidential and damaging trial strategies to the court and the prosecutor. Like the District Court, we cannot accept Mr. White's argument. Mr. White relies on Blanco v. Singletary, 943 F.2d 1477, 1500 (11th Cir. 1991). Unlike Blanco, however, where attorneys conceded to the court during the sentencing phase that there was no mitigating evidence for their client, Mr. White can assert no prejudice here. It is true that Mr. White was asked questions to make sure that he understood his rights and that he acquiesced in certain strategic decisions. In doing so, however, no damaging admissions or revelations were communicated to the Court or the prosecutor. Asking such questions was not improper, but even if it had been, no relief would be appropriate, because no prejudice to Mr. White resulted.

Third, Mr. White argues that judicial bias deprived him of due process. Specifically, Mr. White maintains that the Missouri Circuit Court in considering his claims of abandonment had an ex parte communication with the prosecutor about the proper scope of an evidentiary hearing. Mr. White also claims that the Court adopted verbatim the prosecutor's proposed findings of fact and conclusions of law after this hearing. Even assuming that the Court did something improper, Mr. White cannot show any prejudice from this episode. The Missouri Supreme Court completely vacated the

Circuit Court's decision on appeal and found abandonment. Any prejudice to Mr. White that might have occurred either from the conversation or by the verbatim adoption of findings was eliminated by the decision of the Missouri Supreme Court. Again. we affirm the decision of the District Court.

Accordingly, we reverse in part, affirm in part. and remand to the District Court for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits.

A true copy:

Attest:
CLERK. U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 99-1660WM

Leamon White,	*	
	*	
Appellant,	*	
	*	
v.	*	On Appeal from the
	*	United States District
Michael S. Bowersox,	*	Court for the Western
Superintendent,	*	District of Missouri
	*	
Appellee.	*	

Filed: December 23, 1999

Before RICHARD S. ARNOLD and LOKEN, Circuit Judges, and MELLOY,[5] District Judge.

ORDER

The motion of appellant, Leamon White, to expand the certificate of appealability is granted, and the following additional issues are certified for inclusion in the certificate:

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[5]The Hon. Michael J. Melloy, Chief Judge, United States District Court for the Northern District of Iowa, sitting by designation.

1. Whether appellant's abandonment by the public defender's office and his two appointed post-conviction lawyers during the Rule 29.15 proceeding constituted an excuse for procedural default under Missouri law.

2. Whether the Missouri Supreme Court's remedy for this abandonment was not based on an adequate and independent state ground, and violated due process.

3. Whether the action of the public defender's office in removing one attorney who had been appointed to represent Mr. White, and substituting another attorney 14 days before Mr. White's post-conviction motion was due, was an external cause of his default, and thus allows Mr. White to bring his federal constitutional claims in federal court.

4. Whether post-conviction counsel, once having abandoned Mr. White, were no longer his agents, so that their errors cannot be attributed to him, and therefore became external causes of his default.

The parties are also requested to address one other issue. As we understand the case, appellant makes two basic arguments for avoidance of a procedural bar: inadequate state ground and actual innocence. If the Court decides that either one of these arguments is well taken, is there any reason why it would need to address the other one? Are there any issues the merits of which would be opened up, so to speak, by holding in favor of appellant on the question of actual innocence, but not by a holding in favor of appellant on the issue of adequate state ground?

The appellee is allowed additional time to brief these issues. He will be given to and including January 21, 2000, for this purpose. The brief shall not exceed 25 pages. Thereafter,

appellant may file an answering brief on the same subjects, this brief to be filed on or before February 4, 2000, and not to exceed 25 pages.

It is so ordered.

A true copy.

Attest: /s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 97-**
	)	**1663-CV-W-3**
MICHAEL S. BOWERSOX,	)	
	)	
Respondent.	)	

ORDER DENYING PETITIONER'S MOTION FOR WRIT OF HABEAS CORPUS

Pending is Petitioner's first application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the following reasons, the application is denied.

I. BACKGROUND

A. The Crime

The facts of the crime (which occurred in January 1987) were summarized by the Missouri Supreme Court as follows:

> Defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.
>
> The purpose of defendant's visit was to obtain some "crack" cocaine. Wright had previously promised to get

the cocaine and sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

State v. White, 813 S.W.2d 862, 863-64 (Mo. 1991) (en banc), cert. denied, 502 U.S. 1103 (1992) ("White I"). Further details about the evidence and testimony at trial will be discussed as necessary.

B. Procedural History in State Court

Resolution of many of Petitioner's arguments depends upon an understanding of a convoluted series of events that followed Petitioner's conviction.

> After his conviction defendant filed a timely but unnotarized pro se postconviction motion on August 17, 1989. The motion court appointed counsel on September 25, 1989. Movant's attorney entered his appearance and moved for a thirty day extension on October 20, 1989. On November 9, 1989 the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. This second attorney filed a "First Amended Motion" and a motion for a thirty day extension of time on November 27, 1989. The motion court then granted movant until January 9, 1990 to file a second amended motion. Movant's counsel filed the second amended motion on January 8, 1990. On August 1, 1990 the motion court entered its findings of fact and conclusions of law denying movant relief without an evidentiary hearing.

Id. at 864. At the time, postconviction motions were governed by Rule 29.15,[1] which declared in part that "[a]ny amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days . . . ." See id.

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[1]Missouri Rule of Criminal Procedure 29.15, was "a complicated, hybrid scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of post-conviction relief." Lowe-Bey v. Groose, 28 F.3d 816, 818 (8th Cir.), cert. denied, 513 U.S. 1061 (1994). Despite the consolidation, the direct appeal and the appeal from the postconviction proceedings retain their independent identities. See Part IV.M, infra.

(quoting Rule 29.15(f)). The court noted its prior holdings that for purposes of this rule the date counsel is appointed is the date on which the trial court designates the public defender to represent the petitioner, not the day counsel actually enters his or her appearance. Counsel was appointed, and the thirty day period for filing amended motions began to run, on September 25, 1989. When First Appointed Counsel obtained a thirty day extension (to November 23, 1989) to file an amended petition, he withdrew from the case. A second attorney simultaneously entered his appearance, but did not file an amended motion until November 27, 1989 - four days after the time for filing an amended motion expired. Without addressing the effect of the Second Amended Motion filed on January 8, 1990, White I remanded the case (insofar as it related to postconviction issues) for a determination as to whether the First Appointed Counsel's withdrawal without leave of court constituted abandonment under state law. Id. at 864. The court went on to consider (and reject) those issues raised on direct appeal. Id. at 865-868.

On remand, the trial court dismissed the 29.15 motion because it was not properly verified[2] and alternatively reinstated its prior findings of fact and conclusions of law. It also held that Petitioner had not been abandoned by any of his postconviction counsel (because counsel could not abandon a matter that was not properly before the court, held to be true in this case because of the improper verification). On appeal, the Missouri Supreme Court concluded that the verification was sufficient. State v. White, 873 S.W.2d 590, 594 (Mo. 1994) (en banc) ("White II"). However, the court also observed that because Rule 29.15 contemplated only one extension of time, the second extension of time was invalid and the only valid extension was the one granting Petitioner until November 23, 1989 to file his amended petition. The court determined this was an unalterable

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[2]The verification issue is not relevant to these proceedings and, in the interests of brevity and clarity, will not be detailed here.

requirement of Rule 29.15, holding that it would "still strictly adhere to the requirement that all grounds not raised in the pro se motion are waived, with the exception of those filed in a timely amended 29.15 motion." Id.

Having held the state trial court had jurisdiction over Petitioner's pro se 29.15 motion, the next significant issue (for purposes of the present case) was whether the court had jurisdiction over the first or second amended motions. Both motions were untimely - the first because it was filed after the extended deadline of November 23, 1989, and the second because it was filed pursuant to an impermissible second extension of time. Id. at 595-96. The court "conclude[d] that the untimely filing of defendant's [first] amended motion was not the result of negligence or intentional conduct by White. Rather, the untimely filing resulted exclusively from the inaction of defendant's appointed counsel." Id. at 597. The court went on to conclude that Petitioner was abandoned by his First Appointed Counsel, but only insofar as to the *timing* of its filing, not its content. The court observed "that there is no constitutional right to post-conviction counsel and that failure of the attorney to comply with procedural rules in a collateral proceeding falls on the shoulders of the defendant." id. at 598. To fashion a remedy for the abandonment which would cure the damage caused by the improper timing, the court reinstated the First Amended Motion. It declined to reinstate the Second Amended Petition because, even absent the abandonment by the first appointed counsel, Petitioner never had a right to file a Second Amended Petition. Id. at 599. ("To let the defendant also have the benefit of the second untimely amended motion would grant the defendant additional relief beyond that which he was originally entitled to receive under Rule 29.15."). The case was remanded to the trial court for consideration of the issues contained in the First Amended Motion.

On remand, the trial court denied Petitioner's claims without holding an evidentiary hearing. The Missouri Supreme Court affirmed. White v. State, 939 S.W.2d 887 (Mo.) (en banc), cert. denied, 118 S. Ct. 365 (1997) ("White III.)" The court noted Rule 29.15's requirement that a petition state facts that demonstrate entitlement to relief. It also referred to a previously-established pleading rule applicable in postconviction proceedings:

> [N]o evidentiary hearing will be required unless the motion meets three requirements: '(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant.' State v. Starks, 856 S.W.2d 334, 336 (Mo. banc 1993). Thus, to obtain an evidentiary hearing on claims of ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing (1) that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced.

Id. at 893. The court then considered Petitioner's remaining arguments, rejecting those that required a hearing out of hand based on Petitioner's failure to plead facts. It also addressed - and rejected - the few arguments that were addressed on the merits based on the records before the trial court. Ultimately, the trial court's decision was affirmed in its entirety.

II. PROCEDURAL DEFAULT

"Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of... procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims." Sawyer v. Whitley, 505

U.S. 333, 337-39 (1992) (citations and emphasis omitted). To avoid a procedural default, the habeas petitioner must fairly present his claim to the state court, that is, he must present the same facts and legal theories to the state court that he later presents to the federal courts. Morris v. Norris, 83 F.3d 268, 270 (8th Cir. 1996). In addition, as the quote from Sawyer suggests, it is not enough for Petitioner to simply raise the arguments; they must be raised in a manner that complies with state law. Failure to do so constitutes a procedural default. Sweet v. Delo, 125 F.3d 1144, 1151 (8th Cir. 1997), cert. denied, 118 S. Ct. 1197 (1998). Here, Petitioner's failure to follow state-law pleading requirements for securing a hearing operates as a procedural bar.[3] "If state procedural rules prevent the petitioner from obtaining such a hearing, then the petitioner is' also procedurally barred from obtaining habeas relief in a federal court . . . ." McCall v. Benson, 114 F.3d 754, 757 (8th Cir. 1997); see also Turner v. Delo, 69 F.3d 895, 896-97 (8th Cir. 1995) (state court holding that petitioner "failed to provide the facts required under Missouri law to entitle him to an evidentiary hearing... constitutes a Procedural default"); Smith v. Groose, 998 F.2d 1439, 1441 (8th Cir. 1993).

Although a procedurally defaulted claim ordinarily will not be considered in a habeas proceeding, there are two circumstances in which the procedural bar can be lifted.

> In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

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[3]This issue is discussed in further detail in Part IV.O, infra.

Coleman v. Thompson, 501 U.S. 722,750 (1991). After reviewing the record in this case, the Court concludes the issue of procedural default predominates over the substantive claims asserted by Petitioner. Comprehension is best served by examining these attempts to lift the procedural bar before considering Petitioner's substantive arguments.

A. Actual Innocence

"To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." Schlup v. Delo, 513 U.S. 298, 321 (1995).

> [A] petitioner who raises a gateway claim of actual innocence must satisfy a two-part test. First, the petitioner's allegations of constitutional error must be supported with new reliable evidence that was not presented at trial. Second, the petitioner must establish that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The actual innocence exception requires review of procedurally barred, abusive, or successive claims only in the narrowest type of case--when a fundamental miscarriage of justice would otherwise result.

Weeks v. Bowersox, 119 F.3d 1342, 1351 (8th Cir, 1997) (en banc), cert. denied, 118 S. Ct. 887 (1997).

To support his gateway claim of actual innocence, Petitioner has filed a series of documents, affidavits, reports and other material referred to collectively as his Appendix of Actual

Innocence (the "Appendix"). Subsequently, he filed additional affidavits and materials to supplement the Appendix. Respondent raises a threshold issue by moving to strike all of the material based on the Supreme Court's decision in Herrera v. Collins, 506 U.S. 390 (1993). In Herrera, the Supreme Court addressed the viability of a *substantive* claim of actual innocence entitling a prisoner to relief. As explained in Schlup, despite the label of "actual innocence," the concepts can serve different purposes and, hence, different analyses will apply. In Schlup, the claim of actual innocence was not offered as a ground entitling the prisoner to relief, but rather as a "gateway" through which previously defaulted constitutional arguments could be considered. Schlup, 513 U.S. at 515-16; see also Amrine v. Bowersox, 128 F.3d 1222, 1227 (8th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 1807 (1998) ("Amrine's claim is unlike Herrera's because he does not seek relief on the basis that he is actually innocent, but rather on the basis of an unconstitutional trial. He raises actual innocence as a means to avoid a procedural bar to consideration of his constitutional claims so his gateway claim is properly considered under Schlup.").[4]

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[4]In arguing to strike the Appendix and subsequent affidavits, Respondent relies exclusively upon Herrera and makes absolutely no mention of Schlup - despite the obvious fact that Petitioner has presented the Appendix to support the actual innocence exception pronounced in Schlup and has carefully separated his "actual innocence as grounds for lifting the procedural bar" arguments from his "actual innocence as grounds for relief" arguments. Respondent's blindness to Schlup has made the Court's analysis of this issue very difficult. The failure to even acknowledge Schlup's existence is also curious not only because it is a significant Supreme Court opinion, and not only because it arose from the Eighth Circuit, but because it arose from this *state*.

There may come a time when Respondent expects habeas petitions to be ruled in an extremely prompt manner. See 28 U.S.C. § 2266(b)(1)(A). Respondent's expectation cannot be honored if Respondent fails to acknowledge and discuss controlling Supreme Court precedent.

A petitioner asserting a Schlup "gateway" claim must support his allegations with reliable evidence. Schlup, 513 U.S. at 324; McCoy v. Norris, 125 F.3d 1186, 1190 (8th Cir. 1997), cert. denied, 118 S. Ct. 1195 (1998); Battle v. Delo, 64 F.3d 347, 354 (8th Cir. 1995), cert. denied, 517 U.S. 1235 (1996). There are restrictions (as discussed below) on the type of evidence that can be considered, but the only way to determine whether Petitioner's efforts satisfy these requirements is to look at the Appendix. Therefore, Respondent's Motion to Strike the Appendix (Doc. # 22) is denied. Similarly, Respondent's Motions to Strike the supplemental affidavits are denied to the extent those affidavits present information that purportedly bears on Petitioner's actual innocence. The Motions that are denied are Documents 28, 34, and 37. The Motion to Strike filed on July 8, 1998 (Doc. # 26) is denied to the extent that it seeks to strike Cleveland Ford's affidavit.[5]

To support a claim of actual innocence, the petitioner must present *evidence* not merely allegations or speculations - to prove his point. Weeks, 119 F. 3d at 1352-53. The evidence must demonstrate his factual innocence of the crime; evidence bearing on the allegedly improper application of criminal law will not suffice. Embrey v. Hershberger, 131 F.3d 739, 741 (8th Cir. 1997)(en banc), cert. denied, 119 S. Ct. 78 (1998); Pitts v.

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[5]The remaining portion of this Motion addresses an affidavit that bears on trial counsel's performance, not on Petitioner's assertion of actual innocence. The same is true of the Motion to Strike filed on October 1, 1998 (Doc. # 40). In addition, Petitioner has attached affidavits and other materials to his Traverse, all of which purport to bear on trial counsel's ineffectiveness. These materials do not bear on Petitioner's factual innocence, and cannot be considered in this proceeding because (as will be seen in Part IV, infra). Petitioner's claims of ineffective assistance of counsel have either been procedurally defaulted or Petitioner has had a full and fair opportunity to develop the facts and this Court is constrained to abide by the state court's factual findings. Petitioner cannot offer additional evidence bearing on the ineffectiveness of his trial counsel at this juncture.

Norris, 85 F.3d 348, 350-51 (8th Cir.), cert. denied, 117 S. Ct. 403 (1996). Examples of the proper type of evidence include "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence . . ." Schlup, 513 U.S. at 324. In addition, "an important initial step in the analysis of a habeas petitioner's claim of actual innocence" is whether the proffered evidence is new. McCoy, 125 F.3d at 1190; see also Schlup, 513 U.S. at 324. Evidence that is merely cumulative of evidence already offered at trial will not satisfy the standard. McCoy, 125 F.3d at 1191. In addition, evidence that is known to or readily available to the criminal defendant will not satisfy the Schlup standard. E.g., Schlup, 513 U.S. at 327-28 ("the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either *excluded or unavailable at trial.* (emphasis added)); Bannister v. Delo, 100 F.3d 610, 618 & n.7 (8th Cir. 1996), cert. denied, 117 S. Ct. 2526 (1997); see also Lucas v. Johnson, 132 F.3d 1069, 1083 n.3 (5th Cir. 1998). "In deciding whether a petitioner has made the necessary showing of innocence, a federal court must make its own determination of whether the probative force of the newly presented evidence in connection with the evidence of guilt adduced at trial is sufficient to warrant consideration of the otherwise barred claims. If a petitioner presents evidence of his actual innocence so strong that a court cannot have confidence in the outcome of his state trial, it should not allow his execution unless it is also satisfied that his trial was free of nonharmless constitutional error." Amrine, 128 F.3d at 1227 (quotation omitted). This inquiry may require the Court to make credibility decisions about the witnesses involved. Id. at 1228.

With this legal backdrop in place, the evidence presented at trial and the evidence Petitioner currently relies on can be considered. The primary evidence against Petitioner at trial was the testimony of Kinney and Black - the surviving victims of the attack. Early in her direct examination, Kinney testified that

Petitioner was one of the three individuals who came to the house she shared with Wright, and that the other individuals were Roger Buckner and a man with the last name of "Ford." T.Tr. at 593.[6] She testified that she had been using crack cocaine daily for the past six months, T.Tr. at 595, and that she had been smoking crack the night of January 5 and the morning of January 6. T.Tr. at 596. She explained that she arrived at her brother's house at approximately 7:00 p.m. and, along with five or six other people, smoked crack. T.Tr. at 598-99. Wright, Black, and Black's girlfriend were among the other people there. T.Tr. at 601-02.[7] At approximately midnight, Black drove Wright and Kinney, along with Kinney's sons, Black's girlfriend and Black's brother (Earl) to the house Wright and Kinney shared. T.Tr. at 603. She put her kids to bed, whereupon the adults resumed smoking crack. T.Tr. at 604. At some point, Black and Wright left to take Black's girlfriend and Earl home; approximately forty-five minutes after they returned from this errand somebody knocked at the back door by the kitchen. T.Tr. at 606-07. Kinney answered the door and admitted two people she did not know who were looking for Wright. T. Tr. at 608. (Earlier, Wright had indicated he was expecting some visitors. T. Tr. at 609). Kinney testified that Petitioner was one of the visitors, T. Tr. at 610, and she noticed that he had a solid gold tooth on the right side of his mouth. T.Tr. at 612-13. She also indicated that Buckner looked familiar and thought he knew her brother, T.Tr. at 663-64, and recalled seeing a blue van parked outside the house after Buckner and Petitioner came in. T.Tr. at 632.

The visitors and Wright began discussing a drug transaction. T.Tr. at 610. At some point during the conversation someone

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[6]"T.Tr. at __" is a reference to the trial transcript.

[7]Kinney's sons, Deonta and Raymond (ages eight and seven, respectively) were also there, but were in another room and not taking drugs. T.Tr. at 601.

slammed open the back door and entered the house. T.Tr. at 614. Kinney recognized this third visitor as someone she had seen before but did not recall his name at that time. He told Kinney he was with White and Buckner. T. Tr. at 615. As Kinney returned to the front room and sat on the couch, Petitioner and Buckner drew their guns and Petitioner asked Wright "where the dope was." T.Tr. at 616. After Wright denied having any drugs, Petitioner began hitting him on the head with the gun and kicking him, and kept demanding to know where the drugs and money were. T.Tr. at 617-19. Eventually, Petitioner and Buckner began beating Black as well. T.Tr. at 620.

At one point, Petitioner told Buckner to get something with which to tie Up Wright, and Buckner located an extension cord. They tied Wright's knees and hands together and continued questioning him. When Wright continued to deny having any answers for his attackers, Petitioner took an extension cord and wrapped it around Wright's neck, choking him. T.Tr. at 621-22. When this failed to kill Wright, Buckner made Kinney get on the floor and used her belt and some tape to tie her hands and legs. T.Tr. at 623. Petitioner declared that "[a]ll three of them die." T.Tr. at 624. Buckner went into the kitchen and returned with a kitchen knife. Kinney saw Ford grab Wright's head and hold it back while Petitioner cut Wright's throat. T.Tr. at 626-27. Buckner then made Kinney go into a bedroom. After some debate, he then took the knife from Petitioner and tried to cut Kinney's throat from behind. T.Tr. at 630. The men left soon thereafter.

Kinney's sons contacted the police, and she was taken to the hospital for surgery. She subsequently spoke to the police and was shown some photographs and identified State's Exhibit 102 as a photograph of the man who cut her neck; the picture was of Roger Buckner. T.Tr. at 637-38. She did not recall whether the police ever showed her photographs at any other time that

month while she was in the hospital, nor did she recall how many other occasions the police came to the hospital to talk to her. T.Tr. at 638. On cross-examination, she also disavowed any memory of identifying another individual who was never charged. T.Tr. at 650. In March 1987, the police showed her some additional photographs and she identified State's Exhibit 112 as a photo of the third man who had come to her house (Ford). T.Tr. at 639. The following day, she picked Ford out of a lineup. Finally, in May 1997 she viewed a videotaped lineup and identified Petitioner as one of the men at her house. T.Tr. at 644-45. There is no evidence that Petitioner's photograph was ever shown to Kinney prior to her picking him out of the videotaped lineup. Finally, prior to concluding her direct testimony, Kinney was shown three other photographs, one of which (State's Exhibit 121) was a photograph of Christopher (A.J.) Constantine; Kinney testified that none of the people in those three photographs were at her house that night. T.Tr. at 645-46.

On cross-examination, Kinney was asked about her descriptions of the men. She testified that she told detectives Petitioner was "a black male in his late 20's, five-nine to five-ten, about 170 pounds" and denied telling them that any of the three men spoke with a Jamaican accent. T.Tr. at 658. She did not recall telling them that Petitioner had a gold tooth, T.Tr. at 658-59 - although portions of Kinney's statement to police were read at trial, indicating that she did mention his gold tooth. T.Tr. at 661. She also testified that the second man had facial hair. T.Tr. at 661. Upon further questioning about the additional photos (including Constantine's), Kinney admitted that she knew Constantine to be a drug dealer and that she knew someone named "A.J.", but denied knowing him personally. T.Tr. at 679-80. She also denied telling either her brother or Black that Constantine was one of the men at her house. T.Tr. at 680-81. Petitioner's trial attorney also asked questions demonstrating Kinney's prior drug use. T.Tr. at 669-75.

Black also testified about his prior use of crack cocaine. T.Tr. at 841-42. His testimony about the events of the evening and early morning surrounding the attack substantially mirrors Kinney's testimony. He confirmed Kinney's testimony about a blue van outside her house. T.Tr. at 861-62. He recognized Buckner, but had never seen the second man before. He described the second man as "probably about five-nine, five-ten, probably about 160, and he had a beard, a full beard, and moustache and dark -- well, not real dark skin. He was dark skinned." T.Tr. at 863. Unlike Kinney, he testified that the second man wore a green, red and white stocking cap. Compare T.Tr. at 661 with T.Tr. at 863. Upon viewing Petitioner at trial, Black testified that he looked like "the man that came in with [Roger] Buckner." T.Tr. at 890.

On cross-examination, Black denied knowing anyone by the name of A.J. Constantine or Christopher Constantine. T.Tr. at 895. Upon being shown State's Exhibit 121 (Constantine's picture), Black conceded that he had "some of the same characteristics" as the second man T.Tr. at 896. He denied previously telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine as the second man. T.Tr. at 924, 932. He denied telling anyone that Constantine was the second man, and denied assertions that Kinney had identified Constantine. Black was never explicitly asked if Constantine *was* the second man. To the contrary, he insisted that Petitioner was the second man. T.Tr. at 953-56. He also denied that the second man spoke with an accent. T.Tr. at 938-39, 955.

Other witnesses linked Petitioner to Buckner and Ford to the crime; still other witnesses confirmed Kinney's and/or Black's identifications and rebutted defense counsel's attempt to case doubt on the validity or consistency of those identifications. Officer Mark Hatcher arrested Buckner (pursuant to an arrest warrant) on April 11, 1987. He found Buckner hiding in a closet

in his (Buckner's) girlfriend's apartment. During a search of the premises, he also found a wallet containing Petitioner's driver's license and social security card. T.Tr. at 713. Officer Carl Kegler confirmed that Kinney "immediately recognized [Petitioner] as one of the assailants that had been in the house the night that she was stabbed and Mr. Wright was killed. . . ." T.Tr. at 720. Detective John Peterson testified that he examined Petitioner for distinguishing characteristics shortly following his arrest and that at that time Petitioner had "one solid gold tooth and two open-faced tooths and one of them had three diamonds in it." T.Tr. at 729. Detective Edward Glynn testified that on January 12, 1987 he went to the construction site where Buckner worked in an attempt to find Buckner when he picked up his paycheck. T.Tr. 740-41. By the time he had arrived, Buckner's check had been picked up by someone in a black Cadillac. The Cadillac's trek away from the site was observed by a police helicopter unit, and Glynn was thus directed to a residence in Independence, Missouri. Upon arriving, Glynn found the black Cadillac parked outside a residence. Petitioner was inside the residence. T.Tr. at 741-43. At this time, Petitioner was not a suspect; he voluntarily went to the police station with Glynn, where he was briefly interviewed (by someone other than Glynn) and photographed. T.Tr. at 742-43.[8]

Detective Clarence Gibson testified that he visited Kinney at the hospital following the attacks. She identified Buckner out of a photo array, but failed to pick Constantine's picture out of a different array. T.Tr. at 753-54. Detective Gibson also testified that he interviewed Petitioner when Detective Glynn brought him to the station. Petitioner told him he had loaned his car to an acquaintance named Larry Thomas (whose address he did not know) for the purpose of picking up Buckner's check.

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[8]Glynn had no knowledge as to whether Petitioner's photograph was shown to Kinney when she was interviewed the next day. T.Tr. at 747. Other witnesses denied that this occurred, and nobody testified to the contrary.

Petitioner admitted knowing who Buckner was and that Buckner was "on the run." T.Tr. at 755. He denied knowing where Buckner was hiding.

Detective Gibson confirmed that Kinney told her the number two man had a gold tooth. T.Tr. at 757. He testified that he showed Kinney another photo array on January 18, 1987 that did not include a picture of either Buckner, White or Ford, and Kinney failed to positively identify anyone in that array. T.Tr. at 758. He showed her an array on March 15, 1987, and she identified Ford as the number three man. Up to this point in time, Detective Gibson had not shown Kinney Petitioner's picture, T.Tr. at 759, 782-83 - in fact, up to this point in time he did not even know that the police *had* Petitioner's picture. T.Tr. at 771-72.

One of Buckner's co-workers (Earl Wells) testified that he lived across the street from Buckner and regularly rode to work with him. T.Tr. at 958. Buckner owned a white Plymouth or Pontiac, but the last time they rode together Buckner was driving a black Cadillac. On the night of January 5,[9] he saw Petitioner drive Buckner's white car to Buckner's house and knock on Buckner's door. T.Tr. at 968-69. Buckner came out and talked with Petitioner for thirty to forty minutes. T.Tr. at 968-70. Eventually, Petitioner got back in Buckner's car and drove off; Buckner went back into his house. T.Tr. at 970. Later, Buckner drove off in the black Cadillac. T.Tr. at 971.

Detective Lee Floyd testified that he interviewed Kinney's sons. He showed Raymond (the younger child) a photo array that included pictures of Buckner and Constantine, but the boy

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[9]Although Wells could not testify as to the precise date, the date can be deduced based on Wells' other testimony and testimony from James Brown (Wells' and Buckner's employer) and Officer Carl Kegler (who went to the construction site and talked to Wells).

did not identify anyone in the array. T.Tr. at 988-89. Deonta viewed the same array and indicated that he recognized Constantine but denied that anyone in the array (including Buckner and Constantine) had been at his house on the night of the attack. T.Tr. at 989.

Raymond was one of the Petitioner's two witnesses: at the time he was ten years old. He testified that one of the men that visited his house that night "talk[ed] funny." When asked what kind of voice he understood that to be, Raymond said that it was a "Jamaican accent." T.Tr. at 999. He also testified that he had a chance to see that man's face, and Petitioner was not the man who spoke with a Jamaican accent. T.Tr. at 999-1000. However, when shown a series of photographs (including State's Exhibit 121, Constantine's photo), Raymond denied that any of them looked familiar. T.Tr. at 1000-01.

As will be discussed in greater detail below, nothing contained in the Appendix or the supplemental affidavits demonstrates Petitioner's actual innocence as contemplated by Schlup. Most of the "evidence" is either not new, not evidence, was readily available to Petitioner, or is not exculpatory.

The Appendix contains the following items:

1. Petitioner's sister (Joyce Williams) provides an affidavit averring that she went to work at approximately 5:00 p.m. on January 5, 1987 and left Petitioner at her house to watch her children. She returned home sometime between 2:00 and 4:00 a.m. the next day, and Petitioner was asleep on a bed. She went to sleep around 8:00 a.m., and Petitioner was still sleeping.

There are two with problems Williams' proffered testimony. First, it is not "new" and was available to Petitioner. Petitioner would have had equal access to information about his own

alibi.[10] and Williams communicated her information to Petitioner's trial counsel.[11] Secondly, Williams' statement does not exonerate Petitioner: Kinney testified that she, Wright and Black arrived at her house at midnight. T.Tr. at 603, and after accounting for all of the intervening events, T.Tr. at 605-07, the men entered her house between 1:30 and 2:00 a.m. Williams provides an alibi that starts, at best at 2:00 and, with certainty, no earlier than 4:00.

2. Frank Johnson provides an affidavit averring that he was riding on a Metropolitan Transportation Service van and overheard a woman who identified herself as Carol Kinney talking to the driver. The woman and the driver appeared to be friends. She told the driver that "a Jamaican named A.J. had broken into her house and killed her boyfriend." Later, while incarcerated in the Jackson County jail, Johnson "ran into" Petitioner and, after talking with him, realized the importance of the woman's statement. Johnson's affidavit does not contain a strong aura of believability. Most importantly, there is no indication that the speaker was actually Carol Kinney.

3. Dan Grothaus, a private investigator, provides an affidavit detailing the results of his investigation. He avers that Kinney's sons identified Constantine as one of the people involved in the murder, but provides no basis for this conclusion. He also provides information about Constantine - he fit the age, height and weight description of the second man supplied by both

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[10]In fact, Petitioner's pro se brief before the Missouri Supreme Court argued that his attorney should have called an alibi witness, but never identified the witness or divulged the nature of the alibi. White III, 939 S.W.2d at 899.

[11]This latter point raises an interesting dilemma. Petitioner contends that his trial counsel provided ineffective assistance in failing to call Williams to the stand. This claim is defaulted, and Petitioner relies, in part, on the content of the testimony to demonstrate that a miscarriage of justice has occurred. However, because the testimony was known to Petitioner, it cannot be relied upon to demonstrate his actual innocence.

Kinney and Black, he was a native of Jamaica, and was a crack dealer during the time in question. Grothaus also contacted Kinney in March 1998 and showed her Constantine's picture, whereupon Kinney said "He was there that night" and further identified him as the *third* man to come to her house. She also explained to Grothaus that the hit was meant for her brother's house. Grothaus showed Kinney a picture of Petitioner, and she admitted that the two men looked alike. She continued to insist that none of the assailants had a Jamaican accent. Grothaus contacted Kinney again in April 1998, and she told Grothaus she was sure Petitioner was the man who killed Wright.

Grothaus spoke with Raymond Kinney in February 1998. He told Grothaus that he "remembers little about the killing and attack. He, however, remembers that one of the suspects spoke with a Jamaican accent."

As indicated above, there is no support for Grothaus' statement that the Kinney children identified Constantine. Raymond's statement that one of the assailants spoke with a Jamaican accent was presented at trial and therefore is not new evidence. Moreover, even if Raymond's statement is true, it does not demonstrate that Petitioner was the mis-identified assailant. Finally, Kinney's statements fall far short of constituting a recanting of her earlier testimony. Cf. Amrine, 128 F.3d at 1228 ("Amrine has come forward with evidence not previously available which directly contradicts the key evidence against him at trial. He now has a sworn recantation by the only previously unchallenged eyewitness, Jerry Poe. Poe's affidavit contradicts what he said at trial. He denies having seen the killing and says his identification of Amrine as the killer was false and induced by pressure from Brooks and Hemeyer."). Any uncertainty about her ability to identify Petitioner more than ten years after the crime are easily understood in light of the passage of time and the apparent physical similarities between Constantine and Petitioner. However, her memory --

and ability to identify her assailant -- was undoubtedly better at the time of trial than it was in March of this year. Finally, all of the information about Constantine's criminal activity is irrelevant to Petitioner's guilt or innocence absent some independent link between Constantine and Wright's murder - a link that Petitioner fails to establish.

4. Roger Buckner has submitted an affidavit admitting that he was one of the three men who entered Kinney's residence and that he has been sentenced to life in prison for his role in Wright's killing. However, he denies that Petitioner was present and disavows Petitioner's involvement in any way. Buckner's affidavit might be more persuasive if he identifies the other two men who were with him. In any event, the affidavit does not undermine this Court's confidence in the jury's verdict.

5. Charles Ross, a private investigator, prepared a report of his interview with Black in July 1987. The only potentially exculpatory information contained in Ross' report is the following: "Carol Kinney told him one of the other guys had the street name of 'A.J.', but that he was not sure which one she was talking about." Black's statement to Ross is not evidence, and Black denied the substance of the statement at trial - so the possibility that Kinney made the statement to Black is not really new. Moreover, the statement does not identify the second man as A.J., so it does not exonerate Petitioner.

6. Laura Tyler, an attorney with the State Public Defender, wrote a letter to Petitioner's lead trial counsel, Robert Duncan. The important part of Tyler's letter appears to be her suspicion that the police showed Petitioner's picture to Kinney prior to the time admitted to by the police at trial. Even if this "belief" were evidence, it does not demonstrate Petitioner is factually innocent of the crime.

7. Reports prepared by police following interviews with Raymond, Deonta and Carol Kinney are included in the Appendix. They were also used by Petitioner's trial counsel at trial (to the extent permitted by the rules of evidence), so Petitioner cannot contend they were unavailable. Moreover, they do not provide any new information.

8. Raymond, Deonta, and Carol Kinneys' statements were also transcribed. What has already been said about the police reports in the preceding paragraph applies with equal force to these statements.

9. A police report of an interview with Freddie Wright (Don Wright's brother) dated January 6, 1987 relates that upon being shown Buckner's mug shot, Freddie Wright "indicated that he does not know his name, but indicated that he runs around with Jamaicans." This report appears to have been available to Petitioner at the time of trial. Moreover, it does not demonstrate that a Jamaican (much less Constantine) was with Buckner the night Wright was murdered, nor does it demonstrate that Petitioner was not.

10. A police report of an interview with Ben Kinney (Carol Kinney's brother) dated January 7, 1987, summarizes his statements to the effect that he had previously sold drugs for "two black males he knows only as AJ [sic] and Josh, who pretend to be Jamacians [sic]." Ben also indicated that they held him responsible for a shortage in money. This report appears to have been available to Petitioner at the time of trial. Moreover, it does not demonstrate that A.J. was - or Petitioner was not - involved in Wright's murder.

11. A police report dated January 14, 1987 indicates that Jeanette Rambo, sister of Steve Rambo, told Kinney "that the # 2 suspect" used to stay with her brother; she did not know his name "but said his moniker was 'Monster Man.'" The report

indicates that the police were not familiar with anyone known to use that nickname. As with the prior police reports, this one appears to have been available at trial. Moreover, it contains no evidence demonstrating Petitioner's innocence.

12. The Appendix contains a police report from a completely unrelated case describing the taking of a Polaroid photograph of a suspect. Petitioner offers this report to show that such events are usually described in police reports, whereas in this case no police report indicates that Petitioner's photograph was taken. This information has no bearing on Petitioner's factual innocence.

13. Depositions of Black, Kinney, and Kinney's sons are included in the Appendix. Although Petitioner's trial counsel did not attend the depositions, he had copies of the transcripts and used them (to the extent he could) during Petitioner's trial. The information they contain is neither new nor unavailable.

14. The final two documents in the Appendix are transcripts of Deonta's and Raymond's testimony at Buckner's trial. Buckner's affidavit indicates he was convicted in February 1989; but in his Amended Petition for Writ of Habeas Corpus he alleges that he went to trial in October 1988. Amended Petition, ¶ 51. The transcript from Petitioner's trial indicates Raymond testified in his trial on February 6, 1989, and Deonta did not testify at all. It thus appears that the transcript from Buckner's trial was available at the time of Petitioner's trial. In addition, Raymond and Deonta were available as witnesses at the time of Petitioner's trial.

Nonetheless, assuming that these materials are new and can be considered in a Schlup inquiry, they do not constitute unassailable proof of Petitioner's innocence. Raymond identified one of the men as having long, curly black hair and another man as being "chubby." He further identified the

chubby man as being someone he had seen at Ben's house and knew his name to be A. J. He also testified that the chubby man talked like a Jamaican. This testimony is simply evidence that contradicts other evidence offered at Petitioner's trial - it is not a particularly trustworthy eyewitness account, nor does it affect the Court's confidence in the verdict. In addition to concerns about Raymond's opportunity to see the assailants, the Court notes that Raymond also testified that Buckner as not one of the three men - a fact that is contradicted by Buckner's affidavit - and that when shown Constantine's picture during the trial, he denied that Constantine was one of the three men.

Deonta also testified that one of the three men was "chubby" and identified him as "A.J." He was unable to identify the other three men, and was never asked whether Petitioner was one of the men. Deonta's testimony is not so persuasive or forceful to make it more believable than Black's or his Carol Kinney's.

The affidavits offered to supplement the Appendix do not alter the Court's conclusions. Ford submits an affidavit admitting that he was involved in the killing and identifying "Roger Buckner and a Jamaican friend of his" as the other two men involved. He admits that at his plea hearing (for second degree murder), he told the judge that Petitioner was involved, but now contends that this was not true and that Petitioner was not involved. Contradictory statements offered under oath do not persuade the Court that Petitioner is actually innocent.

Charles Ross submits an affidavit that is substantially the same as his report described on page 19, supra, and it includes a copy of that same report. The Court's earlier comments apply to Ross' new affidavit.

Buckner has submitted a second affidavit swearing that the other men involved with him were Ford and Constantine, and explaining that he was "reluctant to identify A.J. Constantine as

the second man involved in the killing of Don Wright . . . for fear of reprisals against my family, and because I think it is wrong to tell on a person."

As noted earlier, the Court is empowered to consider issues related to credibility. Assuming no other faults exist with respect to Buckner's latest affidavit, the Court does not believe that his change of heart after ten and half years of silence outweighs the eyewitness testimony of two of the victims. The fact that one of the men convicted of murdering Wright is now willing to exculpate Petitioner does not undermine the Court's confidence in the jury's verdict.

Finally, Dorothy Merrell - the mother of Ben Kinney's girlfriend - offers an affidavit dated August 25, 1998 indicating that on the night of January 5, 1987, Wright, Ben and her daughter "were in her house with two other men. One of the men she "now understand[s]" was Roger Buckner, and the other was a man she knew as "J" and she has since identified as Constantine. Wright bragged about having a lot of drugs and invited the man she now identifies as Constantine to come to his house at about 3:00 to buy some. Merrell also avers that Kinney told her that the men who killed Don Wright were the same people that were at her house.

Petitioner presents no indication that Merrell was unavailable as a witness. Moreover, she was not a witness to the crime, and does not exculpate Petitioner.

Having considered all of the evidence offered by Petitioner, the Court concludes that Petitioner has failed to satisfy Schlup's standards for demonstrating a miscarriage of justice. The evidence that Schlup permits the Court to consider does not undermine the Court's confidence in the jury's verdict of guilt.

B. Ineffective Assistance of Postconviction Counsel, Part I

Petitioner concedes that the Eighth Circuit has repeatedly held that ineffective assistance of postconviction counsel cannot serve as cause and prejudice justifying removal of the procedural bar, but contends the Supreme Court left the issue open in Coleman v. Thompson, 501 U.S. 722 (1991). The Court disagrees with Petitioner's characterization of Coleman. "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Coleman, 501 U.S. at 752 (citations omitted). In any event, Petitioner has accurately summarized the holding of cases from the Eighth Circuit. E.g., Sidebottom v. Delo, 46 F.3d 744, 751 (8th Cir.), cert. denied, 516 U.S. 849 (1995); LaRette v. Delo, 44 F.3d 681, 687-88 (8th Cir.), cert. denied, 516 U.S. 894 (1995); Pollard v. Delo, 28 F.3d 887, 889-90 (8th Cir.), cert. denied, 513 U.S. 1003 (1994); Jolly v. Gammon, 28 F.3d 51, 54 (8th Cir.), cert. denied, 513 U.S. 983 (1994); Nolan v. Armontrout, 973 F.2d 615, 617 (1992); McCoy v. Lockhart, 969 F.2d 649, 650-51 (8th Cir. 1992); Johnson v. Lockhart, 944 F.2d 388, 390 (8th Cir. 1991). Therefore, ineffective assistance of postconviction counsel cannot serve as a basis for excusing the procedural bar.

C. Abandonment by Postconviction Counsel

In an argument the Court considers related to the discussed above, Petitioner relies on White II's conclusion that he was abandoned by the first attorney to represent him in postconviction proceedings. Given that Petitioner was not constitutionally entitled to a hearing in the postconviction proceeding, and given that he was not entitled to constitutionally effective legal assistance in that proceeding, Petitioner's argument appears doomed. This conclusion is reinforced by an Eight Circuit opinion to this effect. Mack v. Caspari, 92 F.3d 637, 639-40 (8th Cir. 1996), cert. denied, 117

S. Ct. 1117 (1397). Similarly, Petitioner's argument regarding the sufficiency of the Missouri Supreme Court's remedy for the abandonment is beyond this Court's consideration. Id. at 640.[12]

D. Adequacy of State Grounds

Finally, Petitioner contends that the grounds relied upon in White III are inadequate to serve as the foundation for a procedural default. "The state procedural rule must be both firmly established and regularly followed.., to preclude federal review." Reese v. Delo, 94 F.3d 1177, 1181 (8th Cir. 1996), cert. denied, 117 S. Ct. 2421 (1997).

The Court disagrees with Petitioner's contentions. In cases decided before the First Amended 29.15 Motion was filed, Missouri courts frequently held that "[i]n order to qualify for an evidentiary hearing, movant must meet three requirements: (1) The motion must allege facts, not conclusions, warranting relief; (2) those facts must raise matters not refuted by the files and records in the case; (3) the matters complained of must have resulted in prejudice to the defendant." Ahart v. State, 732 S.W.2d 256, 257 (Mo. Ct. App. 1987); see also Thomas v. State, 605 S.W.2d 792, 794-95 (Mo. 1980) (en banc); Rice v. State, 585 S.W.2d 488, 493 (Mo. 1979) (en banc); Smith v. State, 652 S.W.2d 134, 134 (Mo. Ct. App. 1983); Kearns v. State, 583 S.W.2d 748, 750 (Mo. Ct. App. 1979). In its last version (before being repealed in favor of Rule 29.15 in February 1987), Rule 27.26 declared that an evidentiary hearing was to be held "if issues of fact are raised in the motion." Rule

[12]The Missouri Supreme Court specified that the remedy had to be tailored to the nature of the abandonment; here, the nature of the abandonment dealt with the *timing* of Petitioner's postconviction motions, not their *content*. White II, 873 S.W.2d at 598-99. The Missouri Supreme Court never held that Petitioner's postconviction counsel abandoned him (as that concept is defined in Missouri law) in any respect other than the timing of the motion's filing.

27.26(e). In addition, Rule 27.26(c) declared that the motion "must be submitted on a form substantially in compliance with the form appended" to the Rule, and Part 9 of the form requires the petitioner to "[s]tate concisely . . . the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely to prove such facts." Similar language appeared in Rule 29.15(b). Cf. White III, 939 S.W.2d at 893. The Court thus concludes that the need to plead facts in a postconviction petition was well-established prior to the adoption of Rule 29.15, and the language of Rule 29.15 is similar language to the language from Rule 27.26 that originally gave rise to the judicial holdings requiring facts to be plead. The Court rejects Petitioner's argument that this pleading requirement was novel or not regularly followed.

III. PETITIONER'S ENTITLEMENT TO A HEARING

Petitioner is not entitled to a hearing on his claims for relief.

> A habeas corpus petitioner is entitled to an evidentiary hearing on the allegations contained in the petition if: (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the statecourt [sic] hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Williams v. Clarke, 40 F.3d 1529, 1543 (8th Cir. 1994), cert. denied, 514 U.S. 1033 (1995) (quotation omitted). Stated more succinctly, "a habeas petitioner is entitled to an evidentiary

hearing in federal court if the petition alleges sufficient grounds for release, relevant facts are in dispute, and the state courts did not hold a full and fair evidentiary hearing." Toney v. Gammon, 79 F.3d 693, 697 (8th Cir. 1996). However, a hearing is not required with respect to those claims that are procedurally defaulted or that are clearly without merit. E.g., Zeitvogel v. Delo, 84 F.3d 276, 281-82 (8th Cir.), cert. denied, 117 S. Ct. 368 (1996); Toney, 79 F.3d at 697; Wilson v. Kemna, 12 F.3d 145, 146 (8th Cir. 1994). Most of Petitioner's claims have been procedurally defaulted; the remaining claims can be addressed based on the record already developed by the state courts.

IV. SUBSTANTIVE CLAIMS FOR RELIEF

A. Ineffective Assistance of Trial Counsel:[13] Voir Dire, Part I

Petitioner contends that his trial counsel was ineffective based on his performance during voir dire. In summary, Petitioner complains that trial counsel allowed the prosecutor to "completely dominate the voir dire" and asked very few questions. As a result, trial counsel allegedly missed opportunities to ferret out grounds for challenging jurors for cause or to rehabilitate them in the face of the prosecutor's challenges and educate the jury about the death penalty and Petitioner's theory of defense. Petitioner does not contend that his jury was biased; instead, he argues that he was prejudiced because the jury that decided his case was "prosecution oriented."

The first and foremost reason for rejecting Petitioner's argument is that it was largely procedurally defaulted and there are no grounds for excusing the procedural default. See White

[13]Robert Duncan was lead trial counsel, and John O'Connor was his second chair. Unless otherwise indicated, the term "trial counsel" is intended to refer to both attorneys.

III, 939 S.W.2d at 900. This, alone, justifies rejection of Petitioner's argument without further discussion.[14]

One narrow issue included within this claim was not defaulted: Petitioner's claim that trial counsel was ineffective for failing to rehabilitate Venireman Danny Robertson, who was eventually struck for cause. A claim of ineffective assistance of counsel is analyzed under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). "This standard requires [Petitioner] to show that his 'trial counsel's performance was so deficient as to fall below an objective standard of reasonable competence, and that the deficient performance prejudiced his defense.'" Nave v. Delo, 62 F.3d 1024, 1035 (8th Cir. 1995), cert. denied, 517 U.S. 1214 (1996) (quoting Lawrence v. Armontrout, 961 F.2d 113, 115 (8th Cir. 1992)). This analysis contains two components: a performance prong and a prejudice prong.

> Under the performance prong, the court must apply an objective standard and "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," Strickland, 466 U.S. at 690, while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Id. at 689. Assuming the performance was deficient, the prejudice prong "requires proof 'that there is a reasonable probability that, but for a counsel's

[14]Nonetheless, the Court notes that the record demonstrates that trial counsel's decision was the product of a conscious decision to avoid overemphasizing the fact that this was a death penalty case. T.TR. at 7. Petitioner ridicules this tactic, but it is not so absurd as to violate trial counsel's constitutional obligation to provide effective assistance at trial. Furthermore, Petitioner is unable to demonstrate that the composition of his jury would have been any different had trial counsel acted differently. Cf. Kilgore v. Bowersox, 124 F.3d 985, 994 (8th Cir. 1997), cert. denied, 118 S. Ct. 2352 (1998).

> unprofessional errors. the result of the proceeding would have been different.'" Lawrence, 961 F.2d at 115 (quoting Strickland, 466 U.S. at 694).

Id. Failure to satisfy both prongs is fatal to the claim. see Pryor v. Norris, 103 F.3d 710, 713 (8th Cir. 1997) (no need to "reach the performance prong if we determine that the defendant suffered no prejudice from the alleged ineffectiveness").

In order to properly evaluate Strickland's prongs, the law regarding disqualification of jurors must be considered. A juror is to be disqualified if that "juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quotation omitted). This standard "does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." Id. Finally, "the question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman's state of mind [and] such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." Id. at 428. Consequently, the state court's factual determination regarding a potential juror's views is entitled to deference from this Court. Id.

Petitioner does not challenge the trial court's decision to strike Robertson, and based on Robertson's statements during voir dire such an effort would be futile. Robertson approached the bench and told the trial judge

> Well, I'm having some problems here kind of dealing with this. I always prided myself on being able to make decisions. That's all I do at work. But to decide

> possibly whether another human being might be put to death, I'm going to have some real problems with that, just my own emotional well being.

T.Tr. at 206. After Robertson finished discussing his personal difficulty with being on the jury, the trial judge asked him if he "could consider the full range of punishment," to which Robertson replied "I always thought I could until today, and I don't think I could." T.Tr. at 207-08. After Robertson and the other jurors left the courtroom, the prosecutor and the judge had the following exchange:

> Prosecutor: I just wanted the record to reflect that [Robertson's] demeanor was visibly shaken, something that doesn't come across on the record. But it was clear that the thought of being on this jury was deeply, deeply troubling to him.
>
> The Court: I observed that as well. His eyes were misty and his face was - his lips were quivering, and he was very nearly becoming emotionally distraught, I think, about the prospect of serving in a death case, and that was the reason the Court sustained the State's motion.

T.Tr. at 210-11. Petitioner does not suggest what, if anything, his trial counsel could have done or said to alter Robertson's inevitable removal for cause, and thus fails to demonstrate any possible basis for concluding that trial counsel's performance was constitutionally deficient. In addition, Petitioner's allegation of prejudice is too speculative to credit.

B. Informing Jurors About the Governor's Power to Pardon

Petitioner contends the trial court violated commands of the United States Supreme Court when it told potential jurors that the Governor could pardon Petitioner. Specifically, the trial court made the following statements during small-group voir dire:

> But I guess the ultimate question is, is if the defendant is found guilty could you consider as a possibility the death penalty as a range of punishment? The range of punishment if he's found guilty of first degree murder, the range of punishment is life imprisonment without parole unless he's pardoned by the governor, or death. That's the range. And could you consider the full range of punishment?
>
> * * *
>
> If the jury finds the defendant guilty of murder in the first degree, the only possible sentences are death and life imprisonment without parole except by pardon by the governor.
>
> Would you be able to consider both of these possible punishments?
>
> * * *
>
> If the jury finds the defendant guilty of murder in the first degree after all the evidence is presented, then the possible sentences, the only possible sentences, are death or life imprisonment without possibility of release unless the governor pardons the defendant. Would you be able to consider both of those possible punishments, death and life imprisonment without release? That's the question.
>
> * * *

> If the jury finds the defendant guilty of murder in the first degree, the only possible sentences are death and life imprisonment without possibility of release except by order of the governor. Would you be able to consider both of these punishments after such a verdict of guilty?

T.Tr. at 207, 243, 285, 304-05. Petitioner contends these statements violated Caldwell v. Mississippi, 472 U.S. 320 (1985), which prohibits tactics, comments or instructions that minimize the jury's "truly awesome responsibility" in death penalty cases. As summarized by the Court, "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328-29.

In a case predating Caldwell, the Supreme Court held that a jury could be told of the possibility that a defendant's life sentence could be commuted. California v. Ramos, 463 U.S. 992, 1001-06 (1983). The Caldwell Court specifically adhered to Ramos, citing the "valid sentencing need to give more information on the Governor's power to commute life sentences," which Ramos held bears on the appropriateness of a life sentence. Caldwell, 472 U.S. at 337; see also Caldwell, 472 U.S. at 335-36. In light of these distinctions, the Eighth Circuit has already rejected an argument very similar (if not identical) to the one Petitioner now advances. Bannister v. Armontrout, 4 F.3d 1434, 1444 (8th Cir. 1993), cert. denied, 513 U.S. 960 (1994). Petitioner's second point is rejected.

C. Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection

Petitioner contends that his trial counsel provided ineffective assistance when he failed to object to the Court's

statements described in Part IV.B. supra. As explained earlier, the trial court's comments did not violate Caldwell, so the failure to object could not have prejudiced Petitioner.

D. Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror

After the Petitioner rested his case in chief, but before final instructions were read, the bailiff brought a matter involving one of the jurors (Ruth Tuggle) to the trial court's attention. The bailiff related her observations in open court with Petitioner (but not the jury) present:

> The juror, Mrs. Tuggle, has expressed her desire to hurry the deliberation. She's asked twice at least in the past 24 hours whether it lasts very long. She several times has discussed murders and brought up the case about Ted Bundy being murdered, and he deserved what he got.
>
> There's some concern as to whether she's really paying attention. She doesn't seem quite with it. The other jurors also feel that maybe she's not, or it's hard communicating with her.
>
> I've told her the rules of being a sequestered juror, watching the TV news, what program[s] she can or can't watch, and she just doesn't see[m] to be able to follow those instructions.

T.Tr. at 1026. Petitioner's counsel then asked Petitioner whether it was his desire to keep Tuggle on the jury, and he declared that it was. T.Tr. at 1026.

Petitioner now contends that his attorney was constitutionally ineffective for failing to seek Tuggle's removal.

This claim of ineffective assistance was not presented in either his pro se 29.15 Motion[15] or the First Amended 29.15 Motion, nor was it raised on appeal to the Missouri Supreme Court. The claim has been procedurally defaulted and there is no basis for overcoming the procedural bar, so it must be rejected.

E. Right to Fair and Impartial Jury

Relying on the same facts described in Part IV.D, supra. Petitioner contends that allowing Tuggle to remain on the jury violated his right to a fair and impartial jury. Tuggle's inclusion on the jury was not objected to at trial and was not raised on direct appeal and therefore has been defaulted. Petitioner cannot rely on his attorney's failure to object as cause and prejudice because that claim of ineffective assistance was itself procedurally defaulted, as discussed in Part IV.D, supra. See Oxford v. Delo, 59 F.3d 741, 747 (8th Cir. 1995), cert. denied, 517 U.S. 1124 (1996) ("the performance of trial counsel is irrelevant to the cause [and prejudice] inquiry where the petitioner fails to raise the ineffective assistance of trial counsel claim in state court proceedings.").

F. Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause

Following general voir dire, the trial court questioned the panel in small groups consisting of five panel members in order to assess their ability to fairly consider both of the possible punishments in the event Petitioner was found guilty of first degree murder. During this stage, Venireman Layson initiated a discussion demonstrating his concern as to what would

[15]White III discussed claims raised on appeal that were previously raised only in Petitioner's pro se 29.15 Motion. Most of those claims failed to satisfy the pleading requirements, but the fact that they were discussed suggests that the Missouri Supreme Court was willing to consider the arguments if they had been properly pleaded.

happen if the jury found Defendant guilty of second degree murder, and whether there would still be a need for a penalty phase in the trial. He also indicated that he did not believe the prosecutor was being completely truthful because the prosecutor was not mentioning the possibilities of acquittal or conviction on a lesser offense. T.Tr. at 373-78. The prosecutor moved to strike Layson for cause because he indicated a bias against the prosecutor and because he appeared likely to draw upon and share "extrajudicial knowledge" with the other jurors. The trial court agreed, saying it would "strike him for cause because I think he presents a danger not only to the State, I think also to the defendant, if he's a loose gun." T.Tr. at 389. The judge approved the prosecutor's request to excuse Layson immediately so as to prevent him from talking to the other members of the panel. T.Tr. at 390, 400-01. Petitioner's trial counsel objected to the removal and raised the issue in his Motion for New Trial. However, the issue was not raised on direct appeal, giving rise to the instant claim.

The Sixth Amendment guarantee of effective assistance of counsel applies on direct appeal. Because of Strickland's strong presumption that there is a wide range of reasonable professional conduct "and the reality that effective appellate advocacy often entails screening out weaker issues, the Sixth Amendment does not require that appellate counsel raise every colorable or nonfrivolous issue on appeal. Absent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Roe v. Delo, No. 97-4078, slip op. at 4 (8th Cir. Oct. 30, 1998) (citations and quotations omitted). In evaluating the failure to include this issue on appeal, as well as the prejudice to Petitioner for that failure, the Court must consider the legal analysis that would have applied to the claim. In light of the low level of scrutiny accorded to a trial judge's decision that a potential juror is biased, see Part IV.A, supra, counsel's decision not to raise the issue on appeal cannot be faulted. Moreover, the Court sees

nothing in the record that would have justified second-guessing the trial court's decision, particularly after considering the deference with which that decision would be reviewed.

G. Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror

During the small-group voir dire, Venirewoman Brison (who was number 33 on the panel) discussed her concerns and hesitations about voting in favor of the death penalty. T.Tr. at 276-77, 284. The prosecutor's motion to strike her for cause was denied. T.Tr. at 289-91. Petitioner contends that the prosecutor "slipped" her onto a list of jurors who had been removed for cause, and his trial counsel's failure to remedy this error constituted ineffective assistance of counsel.

This claim of ineffective assistance was not presented in either the pro se 29.15 Motion or the First Amended 29.15 Motion, and has therefore been procedurally defaulted.[16] Moreover, the claim was not raised on appeal to the Missouri Supreme Court. There being no basis for overcoming the procedural bar, the claim must be rejected.

Apart from the procedural problem, the Court notes that Petitioner has improperly and unfairly described the prosecutor's actions. The relevant portion of the transcript reflects the following discussion:

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[16]For that matter, this argument is not raised in the Second Amended 29.15 Motion that the Missouri Supreme Court refused to consider as improper under state rules. Therefore, even if the Missouri Supreme Court "should have" considered the second motion (an issue the Court has already ruled is beyond its power to adjudicate, see Part II.C, supra), the issue would still have been defaulted.

Prosecutor #1: Judge, we have enough, if we want *to save* a bunch of time, I think both parties would agree we could excuse - I think there were eleven, is that right?

Prosecutor #2: Eleven people on sequestration

Prosecutor #1: That should take us down to 40 [venirepersons].

The Court: Well, if we're going to do that by agreement I have no objection to that. So if I have the right list, that's [venirepersons] 23, 25, 27, 20, 46, 33, 69, 45, 73, 90 and 92.

Prosecutor # 1: That's what our numbers show.

Prosecutor # 2: I think it's 42, Judge.

The Court: That's what I started to question. That looks more like a 4 than it does a 9. Yes, Carder. I had the name down. 42. Well, I'm not going to do that unless it's by agreement.

Defense Counsel: I'm just checking, Judge. I'll agree to it.

The Court: Do you understand, Mr. White.

Defendant: (nods head).

The Court: You have no objection to it?

Defendant: No, sir.

Tr. at 493-94. This discussion demonstrates that this list was not offered as a list of potential jurors that had been struck for cause; it was a list of jurors the two sides mutually agreed could be struck. The Court made clear that absent the agreement, these jurors would not be struck. (Interestingly, the fact that Defendant's trial counsel made the agreement was itself offered as a ground for relief in the Second Amended 29.15 Motion. See L.F. at 28.).[17] Finally, the prosecutor did not "slip" Brison onto a list of jurors who had been struck for cause because *nobody* on this list was struck for cause. See T.Tr. at 245-50, 273-74, 291-92, 307, 321, 340-41, 365, 384, 389, 401, 413-14, 434, 444 (portions of transcript referencing jurors who were struck for cause). The Court thus concludes that even if this claim were not procedurally defaulted, it would be denied because it lacks merit.

H. Ineffective Assistance of Trial Counsel: Voir Dire, Part II

In this claim of ineffective assistance of counsel vis-a-vis voir dire, Petitioner contends his trial attorney failed to "question jurors on their views about a number of issues that would come up during the case, including witness identification and misidentification, graphic photograph and crime-scene details, and drug use." As with Petitioner's first claim regarding ineffective assistance during voir dire, see Part IV.A, supra, this claim was procedurally defaulted when Petitioner failed to satisfy the state pleading requirements for obtaining a hearing on this issue, so the claim is procedurally defaulted.

I. Ineffective Assistance of Trial Counsel:

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[17] Separate Legal Files (indicated by "L.F. at __") were created each time this case was remanded to the trial court. The Court's references to the Legal File will be to the one bearing Number 78459, which is the case number for White III and appears as Respondent's Exhibit BB in this Court's file.

Failure to Investigate and Introduce Evidence of Innocence

Petitioner contends that his attorney was ineffective for failing to introduce evidence of his innocence. Much of the evidence Petitioner refers to on this point was already discussed in Part II.A, supra. In addition, Petitioner finds fault with counsel in the following respects:

1. During the crime, Buckner told suspect two that Ernest Black was Earl Black's brother, which suspect two acknowledged. Petitioner contends that had counsel talked to Earl Black, he would have learned that Earl Black does not know Petitioner.
2. Counsel failed to interview Steve Rambo (Buckner's roommate), who owned a blue van similar to the one described by Kinney and Black.
3. Counsel failed to interview Constantine.
4. Counsel failed to interview Wright's family members who reported seeing people "matching the descriptions of Suspect Two and Suspect Three watching their house after the crime."
5. Ben Kinney "saw black men he believed to be Jamaicans driving by his house in a van" but counsel never interviewed him.

Some of these matters were raised in the First Amended 29.15 Motion. There is no need to parse out those that were raised and those that were not because *none* were raised on appeal to the Missouri Supreme Court. Consequently, this claim has been procedurally defaulted.

J. Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence

Petitioner contends that his trial counsel provided constitutionally defective assistance during the penalty phase of

his trial when he failed to investigate, unearth, and introduce mitigating evidence. This issue was not raised in the pro se 29.15 Motion, First Amended 29.15 Motion or on appeal to the Missouri Supreme Court, and so has been procedurally defaulted.[18]

K. Eighth Amendment Violation: Lack of Mitigating Evidence

In an argument related to trial counsel's failure to present certain evidence in mitigation of the death sentence, Petitioner argues that he was abandoned[19] by counsel during the penalty phase of the trial. He further argues that imposition of a death sentence under these circumstances was tantamount to explicitly instructing the jury to ignore mitigating circumstances and thus violates the Eighth Amendment.

Petitioner's argument was not presented to the Missouri courts for consideration. In addition, Petitioner's argument - that an attorney's failure to introduce mitigating evidence constitutes a violation of the Eighth Amendment (as opposed to the Sixth Amendment) - requires creation of a new constitutional rule that cannot be announced in a habeas proceeding. Teague v. Lane, 489 U.S. 288, 316 (1989).

L. Trial Counsel's Conflict of Interest

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[18]This issue also was not raised in the Second Amended 29.15 Motion. See footnote 13, supra.

[19]Lest there be any confusion, it must be pointed out that in arguing his attorney abandoned him, Petitioner does not suggest that was unrepresented during the penalty phase. The prosecutor introduced documents reflecting Petitioner's criminal history, then both sides presented closing argument. T.Tr. at 1054-55.

At various points during the trial. trial counsel asked Petitioner to endorse or acknowledge certain decisions made with respect to his defense. The topics in question included:

1. O'Connor would be assisting in the case, T.Tr. at 4-5
2. the decision not to call an eyewitness identification expert, T.Tr. at 5-6
3. the decision to "de-emphasize" the death penalty during voir dire, T.Tr. at 7
4. Petitioner never told trial counsel that he suffered from any mental problems, T.Tr. at 7-8
5. he was satisfied with the representation he had received to that point, T.Tr. at 8-9.
6. he had no problem with letting the judge re-read an instruction to the jury, T.Tr. at 926-27
7. he understood his right to testify and chose not to exercise that right, T.Tr. at 1011-15
8. certain witnesses would not be called, T.Tr. at 1015-16
9. lesser included offense instruction would not be requested, T.Tr. at 1016-18
10. the risks associated with calling witnesses to offer mitigating evidence, T.Tr. at 1032-34
11. he understood his right to testify during the penalty phase and chose not to exercise that right, T.Tr. at 1047-51

Petitioner challenged these actions in his initial, pro se 29.15 Motion; in doing so, he couched his argument in terms of ineffective assistance of counsel. L.F. at 11. Petitioner now contends that the Missouri Supreme Court should have considered this claim as one asserting a conflict of interest and should have applied Cuyler v. Sullivan, 446 U.S. 335 (1980) instead of Strickland.

The argument was not raised as a claim of conflict of interest in state court, so the claim has been defaulted.

> In order to present a habeas claim to the state court, a prisoner must "fairly present" not only the facts, but also the substance of his federal habeas corpus claim. In this circuit, to satisfy the "fairly presented" requirement, [a petitioner is] required to refer to a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent federal constitutional issue in the Missouri state court.

Abdullah v. Groose, 75 F.3d 408, 411-12 (8th Cir.), cert. denied, 517 U.S. 1215 (1996). Petitioner never contended that the actions described above constituted a conflict of interest, nor did Petitioner cite or make any other reference to Cuyler, so Petitioner never fairly raised this issue in state court.

In any event, the Court doubts that this claim has any merit. Placing a criminal defendant on the stand to confirm his or her understanding of and acquiescence in his rights and strategic decisions about his case does not place the attorney at odds with his client. Moreover, criminal defendants are frequently questioned to insure they understand their right to testify on their own behalf and that the decision to (or not to) testify belongs solely to them. Although the questioning of Petitioner went beyond this issue, the Court does not believe that asking such questions constitutes a conflict of interest between attorney and client.

M. Ineffectiveness of Appellate Counsel: Myriad of Claims

Within this single claim, Petitioner alleges his Appellate Counsel provided ineffective assistance by failing to raise fourteen distinct claims of ineffective assistance of trial counsel. Claims of ineffective assistance of trial counsel are to be asserted in a postconviction proceeding. As discussed in Part I.B. supra, Petitioner's postconviction proceeding was governed

by Missouri Rule of Criminal Procedure 29.15, which at that time[20] was "a complicated, hybrid scheme which consolidates the direct appeal from a criminal conviction and the civil appeal from the denial of postconviction relief." Lowe-Bey v. Groose, 28 F.3d 816, 818 (8th Cir.), cert. denied, 513 U.S. 1061 (1994). "Following the filing of a Rule 29.15 motion, the defendant litigates his or her Rule 29.15 claims through the sentencing court while the direct appeal is held in abeyance. If the sentencing court denies Rule 29.15 relief, a separate notice of appeal must be filed in the sentencing court if the defendant desires to appeal issues raised in the 29.15 motion." Id. at 819. The two appeals are consolidated into a single "hybrid" appeal, but "Rule 29.15 contemplates that the direct appeal and the 29.15 appeal retain their independent identity even though consolidated." Id.

A consequence of the separate appeals retaining their individual character is that the obligation to pursue an appeal from the 29.15 ruling rests with postconviction counsel, not appellate counsel. "No Missouri rule of appellate procedure or criminal procedure relieves post-conviction relief counsel of his or her duties before the time arrives for filing the notice of appeal challenging the denial of Rule 29.15 relief." Id. This is true even though the same attorney is performing a dual role: appealing issues in the direct appeal *and* appealing issues raised in the 29.15 proceeding. Petitioner is not entitled to effective assistance of counsel in a postconviction proceeding, Coleman v. Thompson, 501 U.S. 722 (1991), and therefore is not entitled to effective assistance of counsel in an appeal from the postconviction proceeding. Lowe-Bey, 28 F.3d at 819-20. Thus, when the appellate counsel is performing his function of appealing issues from the 29.15 proceeding, there is no Sixth Amendment protection; the Sixth Amendment only applies to

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[20]Rule 29.15 was amended effective July 1, 1997; the amended version does not apply to Petitioner. Rule 29.15(m).

the attorney's performance with respect to issues arising from the direct appeal. In this claim, Petitioner attacks his appellate counsel's performance in his 29.15 appeal role, not his direct appeal role; there being no constitutional guarantee of effectiveness for the former role, Petitioner's claim is not cognizable.

N. Due Process Violation: Abandonment by Postconviction Counsel

This argument is similar to one advanced by Petitioner as grounds for excusing procedural default, and was addressed in Part II.C, supra. To the extent that the argument relies on the Fourteenth Amendment instead of the Sixth Amendment, granting relief requires creation of a new constitutional rule and the Teague bar applies.

O. Due Process: Pleading Requirements

Petitioner attacks the Missouri Supreme Court's determination that his First Amended 29.15 Motion was insufficient under state law to secure him a hearing, and contends the holding was new and applied for the first time in this case. The Court doubts this issue is cognizable because it involves interpretations and application of state law. In any event, the Court rejects Petitioner's argument. See Part II.D, supra.

P. Due Process: Rule 29.15's Deadlines

Petitioner contends that his Due Process rights were violated by Rule 29.15's strict deadlines. This argument has previously been rejected by the Eighth Circuit. Kilgore v. Bowersox, 124 F.3d 985, 993 (8th Cir. 1997), cert. denied, 118 S. Ct. 2342 (1998); Sloan v. Delo, 54 F.3d 1371, 1379-80 (8th Cir. 1995), cert. denied, 516 U.S. 1056 (1996).

Q. Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams

Petitioner alleges that his trial counsel failed to interview his sister and call her as a witness at trial. Petitioner did not raise the former issue in either his pro se 29.15 Motion or his First Amended 29.15 Motion[21] and is now procedurally barred from raising the issue. (Besides, in the affidavit she supplied for the Appendix, Williams avers that she did speak with Petitioner's trial counsel). In his pro se 29.15 Motion, Petitioner alleged that his trial counsel was ineffective for failing to call Williams as a witness, but the claim was unreviewable because he did not satisfy the pleading requirements. White III, 939 S.W.2d at 899. Consequently, this claim has been defaulted.

R. Ineffective Assistance of Trial counsel: Failure to Give an Opening Statement at the Beginning of Trial

The prosecutor delivered an opening 'statement prior to the introduction of evidence. T.Tr. at 503-30. Petitioner's trial counsel reserved his opening statement, T.Tr. at 530, and delivered one after the state rested. T.Tr. at 996-98. In this claim, Petitioner attacks both the content and the timing of his attorney's opening statement. This claim was not raised in the First Amended 29.15 Motion or presented to the Missouri Supreme Court, so the claim has been defaulted.

S. Ineffective Assistance of Trial Counsel: Failure to Hire an Expert

Petitioner contends his trial counsel was ineffective for failing to hire an expert to testify that those who use crack

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[21]This issue also was not raised in the Second Amended 29.15 Motion. See footnote 16, supra.

cocaine - such as Kinney and Black - suffer damage to their ability to perceive and remember events. The issue was raised in Petitioner's pro se 29.15 Motion, L.F. at 17, but failed to satisfy Rule 29.15's pleading requirements. Consequently, the Missouri Supreme Court refused to review the issue, White III, 939 S.W.2d at 898-99, and the claim is procedurally defaulted.

T. Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances

Petitioner contends that the prosecutor gave insufficient notice of its intent to submit the aggravating circumstances reflected in Instructions 13 and 14 to the jury. Petitioner basis this argument on "Mo. Rev. Stat. § 565.005, due process under the Fourteenth Amendment and freedom from cruel and unusual punishment under the Eighth Amendment." He also contends that two of the instructions were vague. The first permitted the jury to find an aggravating circumstance because Petitioner and his cohorts purposely left gas stove's burners on and blew out the pilot light, thereby "created a great risk of death to more than one person by means of a device which would normally be hazardous to the lives of more than one person. . . ." The second allegedly vague instruction asked the jury to consider whether Wright's murder "involved torture, and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman"

Petitioner's arguments have been procedurally defaulted because they were not presented to the Missouri Supreme Court and were not raised in his pro se or First Amended 29.15 Motions. Even if the instructions were unconstitutionally vague, Petitioner could not satisfy Strickland's prejudice prong because Missouri is a "nonweighing" state, meaning that "a finding of at least one aggravating circumstance is a threshold requirement to imposing a death sentence." Sloan, 54 F.3d at 1386. As long as the jury validly found at least one aggravating circumstance,

an improper instruction is of no consequence. Here, the jury found additional statutory aggravating factors (e.g., that Petitioner had prior felony convictions, that the murder was committed while other crimes (other attempted murders) were being committed, and that the murder was committed in connection with a robbery). Direct Appeal Legal File at 17-18. Assuming an uncured unconstitutional vagueness in the instructions, "[t]he jury's penalty phase verdict is... reliable despite the unconstitutionally vague instruction on the other aggravating factor, and the use of that instruction was harmless." Id.; see also Ramsey v. Bowersox, 149 F.3d 749, 754 (8th Cir. 1998). Therefore, there was no prejudice from trial counsel's failure to object to these instructions.[22]

U. Ineffective Assistance of Trial Counsel: Failure to Object to the Videotaped Lineup

Petitioner contends that when Petitioner was placed in a videotaped lineup on May 26, 1987, he was in jail awaiting trial on an unrelated robbery charge. He alleges that his attorney in the robbery case was not contacted prior to the lineup, and his trial counsel in this case was ineffective for failing to object to the use of the lineup for this reason. Petitioner presented the Missouri courts with several arguments regarding the various lineups administered in this case, but he never raised this challenge.[23] Accordingly, the claim is procedurally defaulted.[24]

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[22]Trial counsel lodged a general objection to the instructions, T.Tr. at 1031; whether this was sufficient to preserve any issues for appeal is an issue that need not be decided because the issue was never pursued on appeal.

[23]In his Second Amended 29.15 Motion, Petitioner challenged a different lineup on these grounds. L.F. at 32. Thus, even if the Missouri Supreme Court "should have" considered the Second Amended 29.15 Motion, this claim would still have been defaulted.

[24]In addition, the claim lacks merit. See Part IV.Z, infra (discussing Moore v. Illinois 434 U.S. 220 (1977)).

V. Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson

Petitioner contends his trial attorney was ineffective for failing to impeach Detective Gibson with evidence that he had committed "improper actions" in prior cases. Petitioner never presented this argument to any Missouri court, so the claim has been defaulted.[25]

W. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Use of Peremptory Challenges and Certain Strikes for Cause

Petitioner contends that the prosecutor utilized peremptory challenges to eliminate five jurors who had "conscientious scruples" against the death penalty and six jurors who expressed difficulty believing witnesses who used illegal drugs. He also claims that his trial counsel failed to object to two of the prosecutor's requests to strike jurors for cause. None of these arguments were raised on appeal to the Missouri Supreme Court, so they have been defaulted.

In addition, the Court notes that Petitioner's first claim is barred by Teague. The use of strikes in this manner is not barred by Batson v. Kentucky, 476 U.S. 79 (1986), and Petitioner would require a new constitutional rule in order to demonstrate that he was prejudiced by the failure to object. The Court cannot find prejudice absent a rule prohibiting the prosecutor's use of strikes for these reasons, and it cannot create the rule in light of Teague.

X. Ineffective Assistance of Trial Counsel:

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[25]This claim also was not included in the Second Amended 29.15 Motion. See footnote 16. supra.

Failure to Object to Prosecutor's Closing Argument During Penalty Phase

Petitioner argues that various aspects of the prosecutor's penalty phase closing argument were improper, and his trial counsel was ineffective for failing to object. Petitioner failed to raise this argument in state court with sufficient specificity to permit review. White III, 939 S.W.2d at 902. Petitioner's failure to satisfy the state pleading rule constitutes a procedural default.

Y. Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver

During cross-examination, Petitioner's trial counsel asked Detective Gibson whether he read Petitioner his rights prior to interviewing him. He also established that Petitioner was willing to talk with Detective Gibson and did not ask for a lawyer. T.Tr. at 775-76. On redirect, the prosecutor asked whether Detective Gibson had asked Petitioner to sign a waiver of his Miranda rights; Detective Gibson said that he had. T.Tr. at 784. Petitioner's trial counsel then approached the bench to object; after the trial court forced him to assert a ground for his objection, he declared "it's irrelevant, it's immaterial, and the fact he signed a consent form has nothing to do with it because he talked to them." T.Tr. at 785. This objection was overruled. Upon resumption of the redirect examination, Detective Gibson reaffirmed that he had asked Petitioner to sign a waiver form and he refused to do so. T.Tr. at 786.

Petitioner contends his appellate counsel was ineffective for failing to challenge this testimony on the grounds that it constituted an infringement on Petitioner's constitutional right to remain silent. The problem with this argument is that trial counsel did not make a constitutional objection; he objected on the basis of relevance. The issue Petitioner claims his appellate counsel should have raised was not preserved at trial and would

have been reviewed only for plain error if raised on appeal. As stated in Part IV.F. supra, "[a]bsent contrary evidence, we assume that appellate counsel's failure to raise a claim was an exercise of sound appellate strategy." Roe, No. 974078, slip op. at 4 (quotations omitted). "The decision to forgo a plain error claim is usually the result of a reasonable winnowing of weaker appellate claims. Therefore, we rarely conclude that an appellate attorney's performance was constitutionally deficient for not raising such a claim." Id. There is no "contrary evidence" present in this case.[26]

Z. Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Black's In-Court Identification of Petitioner

During his direct examination, Black testified that he was shown approximately four videotape lineups in September 1987; he was unable to positively identify anyone in those lineups. T.Tr. at 880. On the Saturday before trial, he was shown two videotapes, T.Tr. at 880-81, and was prepared to testify that one of the men was (or at least appeared to be) the man who slashed Wright's throat. The tape in question had been shown to Black in September 1987. T.Tr. at 883, 892-93. On the Monday the trial started, prosecutors spoke with trial counsel and told him that Black had identified Petitioner as the man who entered with Buckner. Trial counsel misunderstood the prosecutor and thought he meant that Black had positively identified Ford (who was also in the lineup). T.Tr. 881-82, 884. Ultimately, the trial court overruled an objection based on the

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[26]Moreover, the Court doubts that the testimony was a comment on Petitioner's right to remain silent, given that he clearly surrendered that right when he agreed to talk to Detective Gibson. In fact, trial counsel conceded as much. T.Tr. at 784. Petitioner insinuates that the questions were designed to comment on his decision not to testify at trial, but the Court does not believe this is a fair interpretation of the record.

timeliness of the prosecutor's disclosure - the only objection made at trial on this matter. T.Tr. at 884-86.

Petitioner now contends that his appellate counsel was ineffective for failing to challenge Black's identification. However, he does not contend that his appellate counsel should have raised an issue about the timeliness of the disclosure. Instead, he claims his appellate counsel should have argued that the video was unduly suggestive based on its contents and Black's "repeated exposure" to it. He also argues that appellate counsel should have raised a claim based on the fact that trial counsel was not permitted to be at the private screening held by the prosecutor None of these objections were made at trial and would have only been reviewed for plain error, so appellate counsel could reasonably refrain from raising them. Roe, No. 97-4078, slip op. at 4.

The Court also doubts these claims had serious merit. Black's viewings occurred approximately 16 months apart - hardly the repetitious showing Petitioner insinuates occurred. Petitioner contends that the lineup was suggestive because Petitioner was one of two people with beards and the only one in a "blue jail shirt" - but there is nothing in the record to support this purely factual assertion (primarily because he never asked the state courts to rule on the issue). Finally, the Supreme Court has held that "a pretrial corporeal identification conducted after a suspect has been indicted is a critical stage in a criminal prosecution at which the Sixth Amendment entitles the accused to the presence of counsel." Moore v. Illinois, 434 U.S. 220, 224 (1977). However, this right was not implicated here because Black was shown a videotaped array.

In United States v. Ash, 413 U.S. 300, (1973), the Court held that the Sixth Amendment does not require that defense counsel be present when a witness views police or prosecution photographic arrays. A photographic showing, unlike a

corporeal identification, is not a 'trial-like adversary confrontation' between an accused and agents of the government; hence, 'no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary.' Id. at 317.

Id. at 227. The lack of merit associated with these claims further substantiates the presumptive reasonableness of appellate counsel's decision not to seek plain error review.

AA. Actual Innocence

In contrast to his earlier argument - where Petitioner asserted his actual innocence solely in an attempt to excuse his procedural defaults - Petitioner now presents his actual innocence as a substantive ground entitling him to relief. In Herrera v. Collins, 506 U.S. 390 (1993), the Supreme Court pointed out that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. Although actual innocence plays a role in habeas proceedings, it does so only as a supplement to a constitutional claim - not as an independent claim. Id. at 404. This distinction was emphasized in Schlup, a free-standing claim of actual innocence is governed by Herrera, whereas a claim of actual innocence used to demonstrate cause and prejudice to overcome a procedural bar to federal review is governed by a different standard (as later announced in Schlup). 513 U.S. at 315-17. The Court went on to explain the different standards as follows:

If there were no question about the fairness of the criminal trial, a Herrera-type claim would have to fail unless the federal habeas court is itself convinced that those new facts unquestionably establish [petitioner's] innocence. On the other

hand, if the habeas court were merely convinced that those new facts raised sufficient doubt about [petitioner's] guilt to undermine confidence in the result of the trial without the assurance that that trial was untainted by constitutional error, [petitioner's] threshold showing of innocence would justify a review of the merits of the constitutional claims. Schlup, 513 U.S. at 317.

Subsequent Eighth Circuit opinions do not make clear whether Herrera completely bars free-standing claims based on actual innocence or whether, in light of Schlup, it merely erects an extremely high standard for such claims. Herrera was decided in 1993, and Schlup was decided in 1995. Four months after Schlup was decided, the Eighth Circuit cited it for the proposition that a free-standing claim of actual innocence is cognizable and relief can be granted only if the new facts "'unquestionably establish [the petitioner's] innocence.'" Allen v. Nix, 55 F.3d 414, 417 (8th Cir.), cert. denied, 516 U.S. 1014 (1995) (quoting Schlup, 513 S.Ct. at 317). Later, in Meadows v. Delo, 99 F.3d 280 (8th Cir. 1996), the Eighth Circuit was again presented with a free-standing claim of actual innocence and, for that reason, explicitly declared that "reliance on Schlup is misplaced." 99 F.3d at 283. Instead, the Meadows Court relied on Herrera to hold that the "claim of innocence based on newly discovered evidence is not cognizable on habeas review." Id. Finally, in Cornell v. Nix, 119 F.3d 1329 (8th Cir. 1997); the Eighth Circuit relied on Allen and subjected a free-standing claim of actual innocence to the "unquestionable innocence" standard. 119 F.3d at 1334.

Resolution of Petitioner's claim is easy if the claim is not cognizable: if it is not cognizable, no relief can be granted. However, because the law in this circuit is not clear, it is prudent for the Court to consider Petitioner's claim under the standard described in Cornell and Allen. This, too is an easy matter: having failed to satisfy the lesser Schlup standard,

Petitioner cannot satisfy the higher standard described in Cornell and Allen.

BB. Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer

Petitioner claims that, while the jury was deliberating, the prosecutor offered to permit Petitioner to plead to second degree murder and receive a sentence of fifteen years. He claims that his trial counsel failed to discuss the plea offer with him, thereby failing to provide effective assistance. This claim was never raised in the state courts and has been procedurally defaulted.[27]

CC. Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel

On February 3 - the Friday of the first week of trial - Petitioner's lead trial counsel was not present at the start of the day's proceedings. The jury was not given any reason for his absence. T.Tr. at 707. The record does not reflect that he ever appeared at trial that day, and there is no indication he said anything on the record. The record does not reflect a reason for Duncan's absence; Petitioner offers an explanation, but the reason does not appear in the record.

Petitioner argues that lead trial counsel's absence constituted ineffective assistance of counsel. Petitioner did not raise this argument in his pro se 29.15 Motion

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[27]This claim was not raised in Petitioner's Second Amended 29.15 Motion. See footnote 16, supra.

or his First Amended 29.15 Motion (which explains why the reason for counsel's absence does not appear in the record)[28] and so the claim has been defaulted.[29]

DD. Judicial Bias During Postconviction Proceedings, Part I

Petitioner contends that the trial judge in his second 29.15 was biased against him. He bases this claim on the fact that the judge had an ex parte communication with the prosecutor about the scope of the Missouri Supreme Court's remand.

Respondent contends that this claim is not cognizable because it occurred during a postconviction proceeding. The Court is not convinced Respondent is correct, particularly in light of the absence of authority to support this proposition. Inherent in the concept that federal courts will defer to the findings rendered in a state postconviction proceeding is the understanding that those findings were rendered by an unbiased tribunal.

Petitioner's claim is easily disposed of on the merits. As succinctly explained by the Missouri Supreme Court:

> The judge's determination that White had not been abandoned was overturned by this Court on White's second appeal. Attempting to revive this conversation as an issue, White notes that the judge's original rulings on the first amended Rule 29.1 5 motion are still before this Court. This is true, but that judgment was rendered

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[28]In addition, Petitioner failed to raise this argument in his Second Amended 29.15 Motion. See footnote ___, supra.

[29]Moreover, to the extent Petitioner contends he was prejudiced simply because O'Connor conducted proceedings that day, Petitioner must independently demonstrate that O'Connor's performance fell short of the Sixth Amendment's requirements.

> on August 1, 1990, and the allegedly improper conversation occurred over one year later, in October or November of 1991. While we expect judges in this state to show foresight, it is a bit much to expect a judge to disqualify because of a conversation that is to occur more than one year in the future.

White III, 939 S.W.2d at 903. Assuming the claim is cognizable, it lacks merit.

EE. Judicial Bias During Trial

Petitioner has identified six incidents during trial that purportedly demonstrate that the trial judge was biased in favor of the prosecution. Petitioner did not raise this argument on direct appeal, so the claim has been defaulted.

FF. Judicial Bias During Postconviction Proceedings, Part II

Petitioner contends that the trial judge in his 29.15 proceeding demonstrated bias when he adopted the prosecution's findings of fact and conclusions of law verbatim. As stated earlier, the Court does not accept Respondent's argument that this claim is not cognizable. See Part IV.DD, supra.[30] However, as before, the merits are not in Petitioner's favor. The Court does not believe that the trial judge's actions demonstrate bias on the part of the judge. Moreover, the events occurred in connection with Petitioner's first 29.15 proceedings, the results of which were completely reversed by White I. Therefore, even if the judge's use of the prosecutor's proposed

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[30]The Court believes this claim has been procedurally defaulted, but Respondent has not raised this argument. At present, the law is unclear as to whether the Court can raise the issue *sua sponte*. See Trest v. Cain, 118 S. Ct. 478, 480 (1997). If it were clearly permissible to do so, the Court would raise the issue on its own and hold that the claim has been defaulted.

findings of fact demonstrated bias, any prejudice was eliminated.

GG. Ineffective Assistance of Trial Counsel: "Bad Loser" Comment

During small-group voir dire, one of the jurors related an event that occurred when he had served on a jury previously. He explained that following the verdict one of the lawyers told him that some of the State's witnesses had lied. He did not recall whether it was a prosecutor or defense attorney. T.Tr. at 417-18. A lengthy discussion (out of the jury's hearing) about the possibility that these comments poisoned the small group ensued. The trial judge struck three of the five potential jurors for cause, T.Tr. at 444, leaving only Venirepersons Benedict (# 87) and Ford (# 89). Benedict and Ford were returned for additional voir dire, T.Tr. at 454, and the prosecutor was permitted to explain that the incident "was an example of a defense attorney being a bad loser" and "that it certainly wasn't the prosecutor that said a witness lied, and that.., in fact wasn't the case." T.Tr. at 455. Petitioner contends that his trial counsel provided ineffective assistance in failing to object to these statements.

This argument was not raised on appeal and has been procedurally defaulted. In addition, the Court concludes it is impossible for Petitioner to demonstrate prejudice. After excluding those jurors who were struck for cause, peremptory strikes for the main panel were made against jurors with numbers under # 79. T.Tr. at 495-96. Benedict and Ford were candidates to be the second alternate, T.Tr. at 496, but both were struck peremptorily. T.Tr. at 499 (identifying jurors and alternates).

It is true that at the time of Petitioner's trial, Missouri law provided "that criminal defendants are entitled to a 'full panel of

qualified jurors before being required to make peremptory challenges' and that failure to sustain a meritorious challenge for cause is prejudicial error." Sloan, 54 F.3d at 1387 (quoting State v. Wacaser, 794 S.W.2d 190, 193 (Mo. 1990) (en banc)).[31] However, Petitioner cannot argue that his use of a peremptory challenge on either Benedict or Ford[32] constitutes prejudice under Strickland because none of the alternates were called upon to deliberate. T.Tr. at 1027-29 (jurors identified when polled at the end of the case). Thus, Petitioner was not prejudiced by the prosecutor's comments and the resulting "need" to use a peremptory to eliminate Benedict or Ford as a potential alternate.

HH. Ineffective Assistance of Postconviction Counsel, Part II

Petitioner again argues that he was deprived of his Sixth Amendment right to counsel in the postconviction proceedings. The argument is rejected. See Part II.B, supra.

II. Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims

Within this argument, Petitioner claims his appellate counsel should have raised the following grounds: "verdict directing instructional error, Brady violation by the state, challenges to the prosecution's guilt phase and penalty phase closing arguments." Some of these claims are discussed in greater detail elsewhere in this order. The argument regarding

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[31]Wacaser was legislatively overruled, but not until well after Petitioner's trial. Thus, at the time of his trial, Petitioner was entitled to a fully qualified, untainted jury upon which to exercise his peremptory strikes.

[32]Both were candidates to be the second alternate, and neither was chosen. Thus, it can be deduced that the prosecutor used his peremptory on either Benedict or Ford and Petitioner used one on the other.

the verdict director lacks merit, Part IV.LL, infra, so his claim of ineffective assistance of counsel must be rejected as well. Similarly, his Brady claim lacks merit, Part IV.KK, infra, so there could be no ineffectiveness in failing to raise the issue on appeal. Finally, Petitioner has not provided sufficient detail about the remaining portions of this claim to permit meaningful discussion (and, in any event, the Court notes that any appeal would have sought only plain error review).

JJ. Ineffectiveness of Trial Counsel: Failure to Request Mistrial During Prosecutor's Closing Argument

During his closing argument following the trial's guilt phase, the prosecutor told the jury that "if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended -" Supp. T.Tr. at 30.[33] Petitioner's trial counsel objected, and the trial court sustained the objection and instructed the jury to disregard the prosecutor's comment. Supp. T.Tr. at 32-33. Prior to the delivery of the cautionary instruction to the jury, Petitioner's trial counsel moved for a mistrial but also stated that "as a practical matter I don't want a mistrial." Supp. T.Tr. at 31-32. After the objection was sustained in open court, trial counsel approached the bench again and moved for a mistrial, and the motion was denied. Supp. T.Tr. at 33.

On direct appeal, Petitioner challenged the trial court's denial of the motion for mistrial. After recounting the circumstances described above, the Missouri Supreme Court held that "[u]nder these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. The defendant cannot complain about the denial of a

[33]This is a reference to the Supplemental Trial Transcript, which contains the prosecutor's closing argument.

mistrial when his counsel plainly told the court that he did not want this relief." White I, 813 S.W.2d at 866.

Petitioner does not challenge the denial of the mistrial; instead, he argues that his trial counsel's actions constituted ineffective assistance. This argument was not presented in Petitioner's pro se 29.15 Motion, First Amended 29.15 Motion or on appeal, and has been procedurally defaulted.[34]

KK. Ineffective Assistance of Appellate Counsel: Failure to Raise Claim Based on *Brady v. Maryland*

Relying on the assumption that Kinney and Black were shown photographs of White but did not identify him as one of the perpetrators, Petitioner contends his trial counsel should have raised a claim based on Brady v. Maryland, 373 U.S. 83 (1963). Brady held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The obligation to produce extends to material impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985).

Petitioner did not raise this issue in his Motion for New Trial, so on appeal the claim would have been reviewed only for plain error. As stated earlier, the failure to raise a Claim that will be reviewed for plain error is presumptively reasonable. Roe, No. 97-4078, slip op. at 4. There is no basis for overcoming this presumption because there is no indication that the factual predicate to this claim is true: neither Kinney nor Black testified that they were shown Petitioner's photograph

[34]The issue also was not raised in the Second Amended 29.15 Motion. See footnote 16, supra.

prior to the occasions upon which they positively identified him. T.Tr. at 649-51, 662-63, 951.[35]

LL. Ineffective Assistance of Appellate Counsel: Verdict Director

Petitioner contends that Instruction 5 violated his due process rights because it improperly permitted the jury to convict him without finding all the elements of the crime. Instruction 5 incorporated accomplice liability theories and, in pertinent part, instructed the jury that if it found from the evidence beyond a reasonable doubt:

First, that on January 6, 1987, in the County of Jackson, State of Missouri, the defendant or another person or persons caused the death of Don Wright by asphyxiating, stabbing and cutting him, and

Second, that defendant or the other person or persons knew that his conduct was practically certain to cause the death of Don Wright, and

Third, that defendant or the other person or persons did so after deliberation, which means cool reflection upon the matter for any length of time no matter how brief, then you are instructed that the offense of murder in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the death of Don Wright, the defendant aided or encouraged another person or persons in causing the death of Don Wright

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[35]Petitioner's suggestion that Respondent conceded the merits of this claim before the Missouri Supreme Court is incorrect. Respondent's Brief before the Missouri Supreme Court at 34-35.

and reflected upon this matter cooly [sic] and fully, then you will find the defendant guilty of murder in the first degree.

Second Supplemental Legal File at 15-16.

In State v. Ferguson, 887 S.W.2d 585 (Mo. 1994) (en banc), the Missouri Supreme Court held that although a first degree murder conviction could be based on accomplice liability, the element of deliberation -- which distinguishes first degree murder from second degree murder -- must be attributed to the defendant. Ferguson explained that

> [u]nder State v. Ervin, 835 S.W.2d 905, 923 (Mo. banc 1992) [cert. denied, 507 U.S. 954 (1993)], and State v. O'Brien, 857 S.W.2d 212, 217 (Mo. banc 1993), the verdict directing instruction for first degree murder must ascribe the element of deliberation to the defendant specifically, even though the charge is premised on accessory liability. Although the conduct of a defendant may be imputed to a codefendant, the element of deliberation may not. O'Brien, 857 S.W.2d at 218. The rationale for this rule, though not expressly stated in Ervin or O'Brien, is that the failure to ascribe deliberation to the defendant relieves the State of its burden of proving the requisite mental state of the offense. An instruction that relieves this burden violates due process and constitutes error.

Ferguson, 887 S.W.2d at 587. It is clear that Instruction 5 does not violate Ferguson's commands. Instruction 5 establish a two-step process: in the first three elements, the jury was asked to determine whether a first degree murder had been committed but was not asked to assess criminal responsibility for that murder. Upon determining that a first degree murder had been committed, the jury was then required to consider the fourth element -- which was designed to determine if Petitioner could

be held criminally responsible for the first degree murder described in elements one through three. Element four clearly requires the jury to determine whether the Petitioner acted with the requisite deliberation; accordingly, Ferguson's commands were satisfied. In addition, the Eighth Circuit has affirmed a substantially similar instruction. Ramsey v. Bowersox, 149 F.3d 749, 759 (8th Cir. 1998). There being no error, Petitioner was not prejudiced when his appellate counsel failed to raise this issue on appeal.

MM. Ineffective Assistance of Postconviction Counsel, Part III

In this claim, Petitioner asserts more instances of ineffective assistance of postconviction counsel. These claims are denied. See Part IV.B, supra.

NN. Ineffective Assistance of Trial Counsel: Former Prosecutor as Defense Attorney

Petitioner contends that O'Connor was Trial Director for the Jackson County Prosecutor's Office when Wright's murder was being investigated and when the indictment in this case was filed. He also speculates that O'Connor "reviewed the case and assigned it to Mr. Hall and Mr. Peters for trial. He also may have been involved in the decision to seek the death penalty." Prior to jury selection, Duncan asked Petitioner if he understood that O'Connor would be assisting in the case. He also indicated his understanding that O'Connor "until about a year ago was in the Prosecuting Attorney's Office" but that he had not reviewed Petitioner's case during his employment as a prosecutor. T.Tr. at 4-5.

Petitioner now contends that O'Connor's status as a former prosecutor constituted ineffective assistance of trial counsel. Petitioner did not raise this issue in the state courts, so the claim

has been defaulted and this Court cannot consider Petitioner's accusation that O'Connor reviewed his file when he was a prosecutor.

OO. Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor's Opening Statement

During his opening statement, the prosecutor told the jury "Roger Buckner, this defendant Leamon White and Cleveland Ford entered into a conspiracy to rob Don Wright of that crack and entered further into a conspiracy to leave no witnesses to that robbery, to kill everyone present." T.Tr. at 505. The prosecutor also described Petitioner's efforts to hide Buckner after the crime as part of a "conspiracy." Petitioner contends that his trial counsel was ineffective for not objecting to these statements because there was no evidence supporting these claims. The Court disagrees. As the Missouri Supreme Court found, "[r]eview of the trial transcript refutes White's contention that no evidence supported the prosecutor's statement that White conspired with others. Evidence was adduced from which it may be inferred that White and his two accomplices perpetrated a planned robbery and murder. Here, the prosecutor's opening statement was not improper because it placed before the jury and the defense the State's theory of the case." White III, 939 S.W.2d at 902.

PP. Proportionality Review

Petitioner contends the Missouri Supreme Court failed to properly perform the proportionality review required by Mo. Rev. Stat. § 565.035. The fatal flaw in Petitioner's argument is that "[t]he federal Constitution of its own force, of course, requires no such review." Murray v. Delo, 34 F.3d 1367, 1377 (8th Cir. 1994), cert. denied, 515 U.S. 1136 (1995)(citing Pulley v. Harris, 465 U.S. 37 (1984)). Here, the Missouri Supreme

Court conducted the review required by state law, and a federal court cannot re-examine the issue or otherwise look behind the factors actually considered by the Missouri Supreme Court. This Court cannot "consider whether the [state] court misinterpreted the state statute. . . " Sweet v. Delo, 125 F.3d 1144, 1159 (8th Cir.), cert. denied, 118 S. Ct. 1144 (1997). Moreover, a federal court cannot "look behind [the state court's proportionality] conclusion to consider the manner in which the court conducted its review . . . ." Six v. Delo, 94 F.3d 469, 478 (8th Cir. 1996), cert. denied, 117 S. Ct. 2418 (1997) (quoted with approval in Sweet, 125 F.3d at 1159).

QQ. Ineffective Assistance of Trial Counsel: Wasting a Peremptory Strike

Petitioner contends that his trial counsel provided ineffective assistance when he "wasted" a peremptory strike on a prospective juror that had already been struck. The Missouri Supreme Court rejected this claim because Petitioner failed to allege how he had been prejudiced, White III, 939 S.W.2d at 900, and his failure to satisfy the state's pleading requirements constitutes a procedural default.

The Court also notes that the record belies Petitioner's factual assertions. The venireperson in question, Cassandra Hughes, was number 60 on the panel. She was questioned during small-group voir dire, T.Tr. at 352-53, and neither party asked that she be struck for cause. T.Tr. at 353-54. She was not listed among those whom the parties agreed to strike for cause. T.Tr. at 493-94 (discussion of panelists the parties mutually agreed to excuse). Her number was low enough to include her as a potential juror. T.Tr. at 496. While the attorneys were considering their peremptory strikes, Hughes reported that she had the flu and the trial court asked the parties to confirm their agreement that she could be sent home immediately. Although the parties agreed with the factual statement that she could be

excused, they did not agree that she would be struck for cause. Specifically, the prosecutor declared "[f]or now I think all we need to do is say that she's going to be excused because the defendant may end up striking her as one of their peremptories . . . ." T.Tr. at 498. The discussion then turned to the subject of the alternate jurors The prosecutor never agreed that Hughes could be excused for cause; instead, the participants were simply acknowledging defense counsel's intent to strike Hughes, thereby permitting Hughes to leave immediately instead of waiting in the jury room, sick with the flu, until she was later formally dismissed. None of Petitioner's peremptory strikes were "wasted."

RR. Right to Be Present at Critical Stages

Following his conviction, on March 2, 1989 Petitioner filed a Supplemental Motion for New Trial alleging that one of the jurors (Timothy Williams) "failed to reveal on voir dire examination. . . that his brother or other relative was a friend of and had gone to school with the victim, Don Wright." Direct Appeal Legal File at 39. A hearing was held on March 1, 1989,[36] but Petitioner did not attend the proceeding. The record contains no reason for his absence. The Motion (along with other post-trial motions) was denied on April 14, 1989.

Petitioner did not raise this issue in his initial appeal. He raised the issue for the first time in his brief in the third appeal to the Missouri Supreme Court. Keeping in mind that Petitioner's direct appeal was disposed of in White I, the court observed that "[p]lain error review may be considered 'on appeal.' Rule 84.13(c). This is not an appeal of White's

[36]There is no explanation as to how the motion was filed the day after the hearing; however, there is no denying the dates as they appear in the legal file and on the Transcript.

conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the post-conviction court 'clearly erred' in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible." White III, 939 S.W.2d at 904.[37] Consequently, the claim has been procedurally defaulted.

SS. Ineffective Assistance of Trial Counsel: Myriad of Claims

Within this single claim, Petitioner asserts several claims of ineffective assistance of trial counsel. He contends his attorney was ineffective for (1) failing to elicit helpful testimony from Ben Kinney, (2) failing to challenge suggestive pretrial identification procedures, (3) failing to effectively impeach Ernest Black and Carol Kinney, (4) failing to prepare for trial, and (5) eliciting a positive identification of Petitioner from Ernest Black. Petitioner failed to satisfy the state court's pleading requirements for proper presentation of the first four claims, see White III, 939 S.W.2d at 895-97, so they have been defaulted. As to the latter claim, the Missouri Supreme Court affirmed the trial court's finding that "counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before

[37]The Missouri Supreme Court also "assume[d] that the issue is raised as a motion to recall the mandate" and considered whether appellate counsel provided ineffective assistance for failing to raise the issue. White III, 939 S.W.2d at 904. Petitioner has not raised this issue in this forum, so there is no need to address it.

and at trial. At most, therefore. Black's response to counsel's questions was cumulative." White III, 939 S.W.2d at 898. This finding is supported in the record and is entitled to deference. E.g., Pryor, 103 F.3d at 712-13. In light of this finding. Petitioner cannot satisfy either of Strickland's prongs.

TT. Conflict of Interest, Etc.

In an argument very similar to the one presented in Part IV.L, supra, Petitioner contends that his attorney "was ineffective and had a conflict of interest" as demonstrated by his asking Petitioner to endorse strategic decisions in open court. These same actions are also faulted because they "disclosed privileged attorney-client communications and strategy decisions to the prosecutor and Court prior to and during trial." The Court's holding in Part IV.L applies here: these claims were not raised in the state courts and lack merit even if they had not been procedurally defaulted.

UU. Restriction on Cross Examination of Kinney

During trial, Petitioner's attorney attempted to impeach Kinney with police reports of her statements. The reports were not written by Kinney. The trial court disallowed the attempt because it was improper impeachment; they were not Kinney's statements, but rather the officers' statements. Counsel also tried to impeach Kinney with her deposition when she testified she could not remember certain facts. This attempt was also thwarted, given that the deposition did not contradict her trial testimony. Petitioner contends that these evidentiary rulings violated his rights under the Sixth and Fourteenth Amendments.

Ordinarily. an evidentiary question is not reviewable in a habeas proceeding because it involves issues of state, not federal. law. See 28 U.S.C. § 2254(a) (writ of habeas corpus may be granted if person "in custody in violation of the

Constitution Or laws or treaties of the United States."). An evidentiary claim is cognizable if it infringes upon a specific constitutional right. e.g., Clark v. Groose, 16 F.3d 960, 963 (8th Cir.), cert. denied, 513 U.S. 834 (1994), but no specific constitutional right is implicated by the trial court's rulings. The Constitution's guarantees of a fair trial and due process do not alter this conclusion; such a ruling would "constitutionalize" every evidentiary decision made. Petitioner's argument is not cognizable.

VV. Cumulative Error of Trial Counsel

Petitioner contends that the cumulative effect of his trial counsel's actions constitutes an independent basis for relief. The Eighth Circuit has specifically held that claims of ineffective assistance cannot be considered cumulatively; each claim of ineffective assistance of counsel must rise or fall on its own merits. E.g., Pryor, 103 F.3d at 714 n.6; United States v. Stewart, 20 F.3d 911, 917-18 (8th Cir. 1994).

WW. Cumulative Error (Generally)

In an argument related to Part IV.W, supra, Petitioner contends that the cumulative effect of all the constitutional errors entitles him to relief. The Eighth Circuit has held that "cumulative error is not grounds for federal habeas relief as each habeas claim must stand or fall on its own." McDowell v. Leapley, 984 F.2d 232, 235 (8th Cir. 1993) (quotation omitted).

V. CONCLUSION

For the foregoing reasons, Petitioner's application for a writ of habeas corpus is denied.

IT IS SO ORDERED.

DATE 12/4/98

/s/Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 97-1663-**
	)	**CV-W-3**
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

ORDER DIRECTING PARTIES TO SUBMIT SUPPLEMENTAL BRIEFING

On December 4, 1998, the undersigned denied Petitioner's application for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. The order observed that "the issue of procedural default predominates over the substantive claims asserted by Petitioner," slip op. at 6, and started its legal analysis by considering the four arguments Petitioner presented as grounds for overcoming the procedural bar: (a) actual innocence, (b) ineffective assistance of postconviction counsel, (c) abandonment by postconviction counsel, and (d) adequacy of state grounds. The Court concluded there was no basis for overcoming the procedural bar. The Court then considered and rejected the merits of Petitioner's non-defaulted claims.

On appeal, the Eighth Circuit held "that the state procedural rule that barred Mr. White's second amended [Rule 29.15] motion was inadequate to bar federal consideration of these claims." White v. Bowersox, No. 99-1660WM, slip op. at 2 (8th Cir. Mar. 14, 2000). The Court of Appeals also affirmed the rejection of three of Petitioner's claims on the merits. The case

was remanded "for consideration of Mr. White's constitutional claims, except those claims that the District Court has already addressed on the merits." Id. at 11. The mandate was issued on April 28, 2000.

The Court of Appeals specifically refrained from considering the applicability of the "actual innocence" exception to the procedural bar. Id., slip op at 6 n.4. This appears significant because the undersigned originally observed that a number of Petitioner's defaulted claims had not been raised in the second amended Rule 29.15 motion; thus, those claims appeared to be defaulted even if the claims raised in the second amended Rule 29.15 motion could be considered (as will happen now in light of the Eighth Circuit's decision). In other words, even though claims contained in the second amended Rule 29.15 motion can now be considered, not all of the claims previously adjudged to be defaulted were contained in the second amended motion.

The Court is presently of the view that the appropriate approach on remand is to re-examine each of Petitioner's claims. If the claim was disposed of on grounds unrelated to the omission from the second amended petition, then the Court will adhere to its prior decision. Similarly, if the claim was held to be defaulted and was not included in the second amended motion, then the Court will adhere to its prior decision. If the claim was originally held to be defaulted but was included in the second amended motion, then the Court will reconsider the claim in its entirety.

This is the Court's preliminary view and is offered to guide the parties in their post-remand efforts. Before the Court makes a final determination on this matter- and before it takes up the issues to be considered on remand - the parties shall file briefs addressing the following issues:

1. Which of Petitioner's claims are to be considered on remand (and why)?

2. How should those claims be disposed of?

Petitioner shall file its suggestions on or before June 2, 2000. Respondent shall respond to those suggestions on or before June 30, 2000, and Petitioner shall have until July 21, 2000.

IT IS SO ORDERED.

DATE: 05/01/00

/s/_____

ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1660WMKC

Leamon White,	*	
	*	
Appellant,	*	**Order Denying**
	*	**Petition for**
vs.	*	**Rehearing and for**
	*	**Rehearing en banc**
	*	
Michael S. Bowersox,	*	
	*	
Appellee.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

April 21, 2000

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	**FILED**
	)	**JUL 23, 1991**
Respondent,	)	
	)	
vs.	)	**No. 71600**
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY

The Honorable David W. Shinn, Judge

Defendant White directly appeals his jury conviction of first degree murder, three counts of armed criminal action, and two counts of first degree assault. He also moved for postconviction relief under *Rule 29.15* and now appeals from the motion court's denial of relief on procedural grounds. These two appeals were consolidated for review pursuant to *Mo. Const. 1945, Art. V, Section 3* and *Rule 29.15(l)*.

Defendant does not challenge the sufficiency of the convicting evidence, but a brief rendition of the facts follows. Defendant went with his friend Roger Buckner to the home of victims, Don Wright and Carol Kinney. Also present was the third victim, Ernest Black, a guest in the home.

The purpose of defendant's visit was to obtain some "crack" cocaine. Wright had previously promised to get the cocaine and

sell it to White. When defendant and Buckner arrived they discussed the crack deal with Wright. During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children, apparently with extension cords. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

Rule 29.15 Proceedings

After his conviction defendant filed a timely but unnotarized pro se postconviction motion on August 17, 1989. The motion court appointed counsel on September 25, 1989. Movant's attorney entered his appearance and moved for a thirty day extension on October 20, 1989. On November 9, 1989 the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. This second attorney filed a "First Amended Motion" and a motion for a thirty day extension of time on November 27, 1989. The motion court then granted movant until January 9, 1990 to file a second amended motion. Movant's counsel filed the second

amended motion on January 8, 1990. On August 1, 1990 the motion court entered its findings of fact and conclusions of law denying movant relief without an evidentiary hearing.

Movant argues that this case should be remanded to the motion court for findings on the issue of postconviction counsel's abandonment in light of this Court's recent decisions in *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991), and *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991). We agree.

Rule 29.15(f) provides:

> Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. . .

This Court has held that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance. *See Schneider v. State*, 787 S.W.2d 718, 720 (Mo. banc), *cert. denied* 111 S.Ct. 231 (1990) (applying the stated rule prospectively). In this case the motion court appointed counsel, and the thirty day limitation began to run, on September 25, 1989. Movant's first counsel obtained the allowed thirty day extension on October 20, 1989 and then withdrew from the case on November 9, 1989. Movant's second postconviction counsel entered his appearance on November 9, 1989, but failed to file an amended motion until November 27, 1989. *Rule 29.15(e)* specifically states:

> For good cause shown, appointed counsel may be permitted to withdraw. If appointed counsel is

> permitted to withdraw, the court shall cause new counsel to be appointed.

Neither of movant's attorneys obtained the motion court's permission for the change of counsel.[1]

The first attorney's withdrawal without permission from the motion court could constitute abandonment which arguably prejudiced movant. This issue of abandonment should be the subject of a factual inquiry by the motion court, by conducting an evidentiary hearing, or by examining the existing record if no disputed facts appear.

Movant argues that his second counsel also effectively abandoned him by failing to file a timely and complete amended motion. He argues that the amended motions were not properly verified and do not allege sufficient facts and grounds as required by *Rule 29.15(e)*. This failure to verify and properly amend the claims raises questions as to whether the defendant was essentially abandoned by his postconviction counsel. These issues should also be adjudicated in a factual hearing conducted by the motion court under the teaching of *Sanders*, 807 S.W.2d at 495.

Counsels' withdrawal, failure to file a timely amended motion, and allege sufficient facts raise serious questions as to whether the movant received postconviction representation in the sense of *Rule 29.15*. Answers to these questions are for the motion court as part of movant's *Rule 29.15* proceedings. *Sanders v. State*, 807 S.W.2d at 495.

Direct Appeal

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[1] We express no opinion as to what impact, if any, a withdrawal permitted by the motion court would have on the time limitations contained in *Rule 29.15*.

In the interest of expedition. we also address defendant's direct appeal claims and find them to be without merit.

Defendant presents five primary claims of error in his direct appeal. First, defendant alleges the trial court erred in refusing to order a new trial after the court informed the jury during voir dire that the two possible sentences for first degree murder included the death penalty or life imprisonment without probation or parole, unless the governor exercised his executive clemency powers. Defendant claims this statement "served to dilute and restrict the [jurors'] sense of responsibility," and is therefore constitutionally prohibited under *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

First, it must be noted that defendant's counsel did not object to these comments at the time they were made, and our review is necessarily limited to plain error. *Rule 30.20; State v. McMillin*, 783 S.W.2d 82, 95 (Mo. banc), *cert denied* 111 S.Ct. 225 (1990). We find no plain error resulting from the trial court's correct statements of the law. The Supreme Court addressed this question in *California v. Ramos*, 463 U.S. 992 (1983), and held that an instruction allowing the jury to consider the governor's powers did not impermissibly restrict the jurors' role in sentencing. Accordingly, this court held in *State v. Feltrop*, 803 S.W.2d 1 (Mo. banc 1991), that no error results where the statements were correct statements of existing law. *Id.* at 9 (citing *Dugger v. Adams*, 489 U.S. 401 (1989)). The trial court's statements about punishment accurately reflect Missouri law on the possible punishments for first degree murder. *See § 565.020.1*. Defendant's first point is denied.

Defendant's second point alleges that the trial court erred by impermissibly restricting the defense counsel's cross-examination of the state's chief witness, Carol Kinney. Defense counsel confronted Ms. Kinney with prior inconsistent statements made to the police and other witnesses in an effort

to impeach her direct examination testimony. Defendant accurately points out that this Court set a liberal standard for impeachment of witnesses in *State v. Bowman*, 741 S.W.2d 10 (Mo. banc 1987), *cert. denied* 488 U.S. 829 (1988). But the use of prior inconsistent statements is not absolute. In *State v. Taylor*, 726 S.W.2d 335 (Mo. banc 1987), we held "impeachment may be made only where the witness has been asked the specific question upon which [she] is sought to be discredited." *Id.* at 337 (citations omitted). The scope of cross examination is soundly within the trial court's discretion. This contention is well-supported by Missouri cases both from this Court and the courts of appeals.[2] The trial court's decision was not an abuse of discretion. The second point is also denied.

Third, defendant claims the trial court erred in sustaining the prosecutor's challenge of venire members Robertson and Bryson for cause on account of their opinions about imposing the death penalty. Again, this matter rests within the discretion of the trial court, and we find no reason to disturb that court's ruling. This Court in *State v. McMillin*, 783 S.W.2D at 91, reiterated the proper standard for striking venire members based on their views regarding the death penalty. The record must show for each venire member struck that the "views would 'prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] oath.'" *Id.* at 91, *quoting Wainwright v. Witt*, 469 U.S. 412, 420 (1985).

Venireperson Robertson clearly stated that as a member of the jury he would be incapable of considering death as one of the possible penalties. Defense counsel made no attempt to rehabilitate this venire member, although he did object "just for the record." Similarly, Venireperson Bryson stated that she was opposed to the death penalty. Upon defense counsel's

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[2] *See, e.g., State v. Taylor*, 726 S.W.2d 335 (Mo. banc 1987); *State v. Gilmore*, 681 S.W.2d 934 (Mo. banc 1984); *State v. Laux*, 755 S.W.2d 315 (Mo. App. 1988); and *State v. Dunn*, 731 S.W.2d 297 (Mo.App. 1987).

questioning she stated that she could at least consider the death sentence, but would not vote in favor of imposing it. This Court defers to the trial judge's superior position to determine the impact of the venire member's statements and demeanor. The record supports the trial judge's conclusion that these jurors could not give appropriate consideration to the death penalty.

Defendant next argues the trial court erred by refusing defense counsel's motion for a mistrial based on statements made in the prosecutor's closing argument. The prosecutor stated:

> Because if one of you doesn't do your job, if just one of you doesn't do your job, ladies and gentlemen, this man wins, and this man gets away with what he intended -- . . .

Defendant's attorney immediately objected to this statement and requested the court to give the jury instructions to disregard the statement and follow the written instructions as given by the court. The trial court sustained the objection and gave the cautionary instruction defendant requested. Defense counsel then moved for a mistrial "to protect the record," but stated he did not want a mistrial "as a practical matter." The trial court denied the mistrial motion.

Under these circumstances, the trial court cannot be said to have erred in refusing to grant the drastic remedy of a mistrial. *See State v. Laws*, 668 S.W.2D 234, 238 (Mo.App. 1984). The defendant cannot complain about the denial of a mistrial when his counsel plainly told the court that he did not want this relief.

Finally, defendant invokes this court's mandatory proportionality review under *§ 565.035, RSMo* 1986, and argues that the death sentence in this case is excessive and disproportionate when compared to similar cases. We reject

this contention and further find no indication that the sentence was imposed of passion, prejudice or any other arbitrary factor.

Disregarding those cases in which the state waived the death penalty as a possible sentence,[3] this defendant's death penalty is apparently commensurate with other similar cases in which the ultimate penalty has been imposed. We find cases similar to this one in which the jury recommended the death penalty. In *State v. Grubbs*, 724 S.W.2D 494 (Mo. banc 1987), a defendant was sentenced to death for tying up a victim, cutting his throat, and attempting to burn down the victim's trailer where the crime occurred. Similarly, in *State v. McMillin*, 783 S.W.2D 82 (Mo. banc 1990), this Court upheld a death sentence for a defendant who gagged, beat and set on fire a victim from whom the defendant had expected to obtain illegal drugs. Other cases with somewhat similar facts may not have resulted in the imposition of the death penalty, but this circumstance does not require the mitigation of this death sentence. The proper inquiry in determining proportionality is "not whether any similar case can be found in which the jury imposed a life sentence, but rather whether the death sentence is excessive or disproportionate in light of 'similar cases' as a whole. *See* § 565.035.3(3)." *State v. Mallett*, 732 S.W.2D 527, 542 (Mo. banc 1987). On the basis of prior cases, we find this defendant's sentence comports with similar cases in which other defendants received the death penalty. Defendant claims that his death sentence is disproportionate because his accomplice received a life sentence for his role in the crimes (*see State v. Buckner*, ___ S.W.2d ___ (Mo. App. 1991), but the state waived the death penalty in that case. The multiple and vicious assaults, in the course of an attempt to obtain money and drugs, demonstrate conduct of the most aggravating sort.

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[3]The Court has held that such cases are not appropriately considered for proportionality review purposes. *See State v. Byrd*, 676 S.W.2d 494 (Mo. banc 1984).

Conclusion

Defendant's conviction and death sentence are affirmed pursuant to *§ 565.035.5 RSMo* 1986. His appeal based on the denial of *Rule 29.15* relief is reversed and remanded to the motion court for further proceedings consistent with *Sanders v. State*, 807 S.W.2D 493 (Mo. banc 1991) and this opinion.

Charles B. Blackmar, Judge

Robertson, C.J., Covington, J., Kennedy, Sp.J., and Higgins, Sr.J., concur; Holstein, J., concurs in separate opinion filed; Rendlen, J., concurs and concurs in separate opinion of Holstein, J.

FILED

05-686 NOV 21 2005

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
VOL. 2 OF 3

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SUPREME COURT OF MISSOURI
en banc

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	)	JUL 23, 1991
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	)	
vs.	)	No. 71600
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

CONCURRING OPINION

I concur fully in the Court's decision affirming the conviction. However, my concurrence with that portion of the opinion reversing the Rule 29.15 conviction is done with some reservation. I believe there is a serious question whether the appellant has properly preserved, in his point relied on, any claim that there was a violation of Rule 29.15(e). It is not a constitutional violation, but a violation of that rule which justifies a reversal under the opinions in *State v. Luleff* and *State v. Sanders*, cited and relied on in the majority opinion.

The point relied on, upon which the Rule 29.15 judgment is reversed, states as follows:

> The motion court clearly erred in denying appellant's motion for postconviction relief because the record shows that appellant was denied a full and fair hearing on all of his claims due to ineffective assistance of appointed 29.15 motion counsel, in violation of the fifth, sixth, eighth, and fourteenth amendments to the

> United States Constitution and article I, sections 10, 18(a), and 29.15 of the Missouri Constitution, in that appointed counsel failed to file a timely amended motion and failed to ascertain if all justiciable allegations of error were included in the amended motion that was filed.

It is noteworthy that no claim is made in the point relied on that counsel or the trial court failed to comply with Rule 29.15(e). In the authorities under the point, no mention is made of Rule 29.15(e). The rules are reasonably clear as to what is required in a point relied on portion of a brief:

> The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous, with citations of authorities thereunder.

Rule 84.04(d). In this particular case, the only violation asserted is a violation of a constitutional right. No claim is made that the rules of this Court were violated.

The United States Supreme Court recently reiterated that there is no constitutional right to counsel in a post-conviction proceeding, and the burden of an error made by an attorney in a collateral proceeding, including failing to meet time constraints under a state procedural rule, falls on the shoulders of the defendant. *Coleman v. Thompson*, 59 U.S.L.W. 4789.

I can think of nothing that is clearer than the language of our rule requiring the preservation of claims:

> Apart from questions of jurisdiction of the trial court over the subject matter and questions as to

> the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, allegations of error not briefed or not properly briefed *shall not be considered* in any civil appeal . . .

Rule 84.13(a) (emphasis added). The language of that rule must be given at least as much meaning and force as the languate of Rule 29.15(e).

In this case, appellant's brief was filed before the decision in *Luleff* and *Sanders*. Only in the reply brief was Rule 29.15 relied on and *Luleff* and *Sanders* were cited. Because of the peculiar circumstances of this case, I am willing to forgive the shortcomings in appellant's brief. In the future, I will not join in an opinion in which the *Sanders* claim is not properly preserved in a brief that complies with this Court's rules. To require less than compliance with our rules on briefing undermines the integrity of all the rules and leads to confusion among bench, bar and the general public. The rationale behind the rule on briefing is stated in *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978), and need not be amplified here. It is sufficient to say that requiring a party to identify the issues to be decided is not unreasonable, but is essential to our process.

The current vogue in capital cases is to transmute virtually every claim of error into a violation of some provision of the state or federal constitution. The fact is that many, if not most, rights are granted under the grace of a rule, statute or judicial precedent. The right to counsel and counsel's duties in a Rule 29.15 proceeding are guaranteed by the rule, not the Constitution. Failure to properly brief the point is, or at least should be, a waiver of the claim.

JOHN C. HOLSTEIN, Judge

SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	**FILED**
	)	**MARCH 22, 1994**
Respondent,	)	
	)	**MODIFIED**
	)	**APRIL 26, 1994**
	)	
vs.	)	**No. 71600**
	)	
LEAMON WHITE,	)	
	)	
Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF
JACKSON COUNTY

The Honorable Alvin C. Randall, Judge

Defendant was convicted in Jackson County Circuit Court of first degree murder, armed criminal action and first degree assault. Defendant was sentenced to death. His direct appeal and motion for post-conviction relief were consolidated. This Court affirmed the appellant's direct appeal and remanded to the motion court for findings on the issue of post-conviction counsel's abandonment in light of *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). On remand, the motion court dismissed defendant's Rule 29.15 motion because it was not properly verified. In the alternative, the motion court reinstated its findings of fact and conclusions of law dated August 1, 1990, whereby the court denied defendant's motion on the merits. The motion court also reinstated its findings of fact and conclusions of law dated April 15, 1992, in which it determined that defendant was not abandoned. This Court holds that: (1) the

verification requirement for defendant's pro se 29.15 motion was met when defendant signed the motion; (2) a remand to the motion court in accordance with *Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993), is required for findings of fact and conclusions of law on defendant's pro se 29.15 motion; (3) defendant's first and second amended 29.15 motions were verified, but were not timely filed and should have been dismissed; (4) defendant was abandoned by the decision of the Office of State Public Defender to change defendant's counsel fourteen days before the end of the sixty day period for filing the Rule 29.15 amended motion without leave of court, by his first appointed counsel's withdrawal without leave of the motion court, and by both his first and second appointed counsel's failure to file an amended motion timely; (5) defendant was not abandoned by counsel for improperly verifying his amended motions or for failure to allege sufficient facts and grounds for relief; (6) defendant's first amended 29.15 motion is revived because defendant was abandoned as to the timeliness of the first amended motion but not as to the motion's content; (7) defendant's second amended 29.15 motion was properly dismissed as untimely filed; and (8) on remand the motion court should make findings of fact and conclusions of law on defendant's first amended motion in accordance with *Barry*, 850 S.W.2d 348.

FACTS

We adopt the statement of facts from our earlier opinion in *State v. White*, 813 S.W.2d 862 (Mo. banc 1991). The brief rendition of the facts in *White* are as follows.

On January 5, 1987, defendant went with his friend Roger Buckner to the home of the victims, Don Wright and Carol Kinney. Also present was the third victim, Earnest Black, a guest in the home. The purpose of defendant's visit was to obtain some "crack" cocaine. Wright had previously promised

to get the cocaine and sell it to White. When defendant and Buckner arrived, they discussed the crack deal with Wright.

During the discussion Cleveland Ford, another of White's friends, came into the house unannounced through the back door and claimed to be associated with defendant and Buckner. At that point, the three purported drug buyers drew guns. Defendant put his gun to Wright's head and asked him where he kept the money and drugs. Wright said there were no drugs or money in the house. Defendant and his companions then tied up Wright, Black, Kinney and Kinney's two children. The assailants beat Wright and Black with their guns, all the while unsuccessfully interrogating them about where the money and drugs could be found.

According to the witnesses' testimony, White declared that the three adults should die. Ford held up Wright's head while defendant slit his throat. Buckner then cut Kinney's throat repeatedly, slicing her jugular vein. Defendant, Buckner, and Ford then turned on the gas stove, extinguished the pilot lights, and left the apartment. Wright died from strangulation and asphyxiation. Black and Kinney survived this vicious attack and later identified White, Buckner and Ford as their attackers.

RULE 29.15 PROCEEDINGS

After his conviction, defendant filed a timely pro se post-conviction motion on August 17, 1989, which was not notarized. Defendant signed and placed his thumbprint on the pro se motion, stating that a notary public was unavailable. On September 25, 1989, the court appointed the Office of State Public Defender for the Sixteenth Judicial Circuit to represent the defendant on his post-conviction relief motion and granted defendant until October 23, 1989, to file an amended motion. On October 20, 1989, movant's first attorney entered his appearance and moved for a thirty day extension to file his

amended motion. The motion court granted defendant an extension until November 23, 1989; this was the only extension authorized under Rule 29.15(e).

On November 9, 1989, which was fourteen days prior to the last day the amended motion could be filed,[1] the first attorney filed a motion to withdraw, and a second attorney entered his appearance as movant's counsel. On November 23, 1989, which was the filing deadline, neither of defendant's appointed counsel had filed an amended motion. On November 27, 1989, defendant's second appointed counsel filed a first amended motion and a motion for a thirty day extension of time. This first amended motion contained a handwritten verification that defendant had signed on November 14, 1989, which was prior to the drafting of the amended motion. The verification was notarized by defendant's second appointed counsel.

Although the motion court had no jurisdiction to do so under Rule 29.15(e), it granted movant's request for a second extension of time to January 9, 1990, to file another amended motion. Movant's counsel filed the second amended motion on January 8, 1990. The second amended motion also contained the handwritten verification that appellant had signed on November 14, which was prior to the drafting of either the first or second amended motions. On August 1, 1990, the motion court entered its findings of fact and conclusions of law denying

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[1]The sixty days (original thirty days plus one extension of thirty days) within which the defendant's 29.15 motion could be filed actually expired on November 24, 1989 The court, however, set the filing deadline for November 23, 1989. Thus, defendant's second appointed counsel actually could have had fifteen days under Rule 29.15(f) from the date he entered his appearance to file an amended motion. But the first amended motion was untimely filed on November 27, which was eighteen days after the second attorney entered his appearance.

movant relief without an evidentiary hearing. On appeal from the motion court's findings, this Court remanded to the motion court for a determination of whether post-conviction counsel had abandoned defendant in light of this Court's decision in *Sanders*, 807 S.W.2d 493.

On remand, the motion court found that defendant was not abandoned because his original pro se motion was not properly verified and, therefore, the court dismissed defendant's pro se motion and the first and second amended motions filed by his second attorney. The court concluded that an attorney cannot abandon something that does not exist. In the alternative, the motion court found that: (1) the first attorney's withdrawal without permission of the court did not amount to abandonment because defendant's second attorney had ample time within which to file the first amended motion (sixty days); (2) the late filing of defendant's first amended motion did not amount to abandonment because of the order allowing defendant an extension of time to file his first amended motion; and (3) defendant was not abandoned by the late filing of his second amended motion because it was filed within the extension granted by the court. Finally, in the third alternative, the motion court reinstated its findings of fact and conclusions of law dated August 1, 1990, overruling defendant's 29.15 motion in the event that this Court determines that it was not proper for the motion court to dismiss defendant's pro se motion and first and second amended motions filed by counsel.

PRO SE MOTION AND VERIFICATION

The State argues that the motion court did not have jurisdiction to rule on defendant's 29.15 pro se motion because it was not properly verified. Rule 29.15 requires: "The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not

listed in the motion." In *Crawford v. State*, 834 S.W.2d 749, 752 (Mo. banc 1992), we concluded that "verified" as used in Rule 29.15 means that a declaration must be made in a manner that is supported by a movant's oath or affirmation. "A movant does that by subscribing to the required declaration while in the presence of someone authorized by Missouri law to administer oaths and affirmations." *Id.* For inmates such as defendant White, post-conviction motions are generally verified by a notary located in the correctional facility. In our experience, defendants who are incarcerated frequently complain that they have difficulty arranging for a notary public to verify their post-conviction motions so that they can be timely filed. We pass no judgment of the validity of this excuse. But death penalty cases, often involving heinous crimes, have become clouded by arguments regarding verification and the filing of paper work. Missouri courts need to see through this blizzard of paper and technicalities that fog the underlying issues so that they can reach a just and timely result, especially in death penalty cases. The public is frustrated with the drawn-out nature of death penalty cases and, therefore, we need to refine the post-conviction motion requirements to expedite the proceedings.

Although we wish to avoid any unnecessary technicalities that hinder a movant's ability to file timely a pro se 29.15 motion, we remain stringent about the time requirements for post-conviction motions. To alleviate one technicality, however, we hold that henceforth, for purposes of filing a pro se 29.15 motion, the defendant's signature will be sufficient verification "that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion." Rule 29.15(d). We will still strictly adhere to the requirement that all grounds not raised in the pro se motion are waived, with the exception of those filed in a timely amended 29.15 motion.

Although we are relaxing the verification requirement for defendants' pro se 29.15 motions, we will continue to require amended motions filed pursuant to Rule 29.15(e) to be properly verified. This is in part because "[a]n amended motion differs significantly from the original motion." *Bullard v State.* 853 S.W.2d 921, 922 (Mo. banc 1993). The original pro se motion is relatively informal "and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." *Id.* On the other hand, "an amended motion is a final pleading, which requires legal expertise. Counsel must be appointed to represent indigent movants in order to ensure its proper drafting." *Id., citing* Rule 29.15(e). Since the amended motion is drafted by appointed counsel, it is necessary to have the amended motion verified in order to ensure that movant believes it is accurate and constitutes all grounds for relief known to movant. Additionally, this helps to ensure that movant is adequately represented. We will, therefore, continue to require the verification of amended 29.15(e) motions.

In its order dated August 28, 1992, the motion court dismissed all of White's 29.15 motions because they were not properly verified. However, the court stated that in the alternative, it overruled defendant's 29.15 motion on the merits for all the reasons stated in the findings of fact and conclusions of law dated August 1, 1990. In those findings of fact and conclusions of law, the motion court failed to rule on all the defendant's claims set forth in his pro se 29.15 motion. Because defendant's amended 29.15 motion specifically stated that it was "intended to supplement and not supersede movant's pro se motion," the motion court should have made findings on all the issues raised in defendant's pro se 29.15 motion. Therefore, we remand back to the motion court for findings of fact and conclusions of law on defendant's pro se 29.15 motion. On remand, the motion court shall conform to all of this Court's holdings in *Barry v. State,* 850 S.W.2d 348 (Mo. banc. 1993).

FIRST AND SECOND AMENDED 29.15 MOTIONS

The next issue is whether the trial court had jurisdiction to rule on defendant's first and second amended motions. Defendant's amended motion must be properly verified and filed in a timely fashion in order to comply with Rule 29.15(f), which states:

> Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for *one additional period not to exceed thirty days.*

Id. (Emphasis added.) Unless both the time and verification requirements are met, the motion court has no jurisdiction to rule on the defendant's 29.15 motion.

First, we will address the verification requirement and the effect that defendant White having signed it in blank had on the motion court's jurisdiction. The purpose of requiring verification of defendant's amended motion is to ensure the accuracy and completeness of the 29.15 motion drafted by defendant's counsel. It also discourages frivolous and unfounded allegations. *Malone v. State,* 798 S.W.2d 149, 151 (Mo. banc 1990). In this case, defendant attached a handwritten verification, which he had signed on November 14, 1989, to both his first and second amended motions. This verification, which was signed in blank, predated the existence of both amended motions. Defendant White stated that he signed the verification in blank during his initial meeting with his appointed counsel "so that it [the verification] would be available when the amended motion was ready." By signing the verification in blank, defendant knew or should have known

that he was an active participant in falsely verifying a document that had not yet been written. We, therefore, will not allow him to later argue that the document that he falsely verified is incomplete or does not raise all grounds known for relief. When white signed the verification in blank, he waived all his rights to complain about its content.

The fact that defendant White signed the verification in blank also has no effect on the motion court's jurisdiction. We will not allow a defendant who actively participates in falsifying the verification to argue lack of jurisdiction because of that improper verification. Once White signed the verification and it was notarized by his attorney, he waived all right to assert that the verification requirement of Rule 29.15 was not met for the purpose of establishing the motion court's jurisdiction.

The second requirement that must be met to invoke the court's jurisdiction is that the motion be timely filed. Rule 29.15 clearly states that defendant has thirty days to file his amended motion and that the court may extend the period for filing "for one additional period not to exceed thirty days." *Id.* In other words, the defendant is allowed a maximum limit of sixty days to file his amended motion from the day his counsel is appointed. "This Court has held that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance." *White,* 813 S.W.2d at 864, *citing Schneider v. State,* 787 S.W.2d 718, 720 (Mo. banc), *cert. denied.* 498 U.S. 882 (1990).

Here, the public defender's office was appointed on September 25, 1989. Defendant's first attorney was given until October 23, 1989, to file his amended motion. Defendant's first attorney then requested a thirty day extension, and he was granted until November 23, 1989, to file his amended motion.

On November 9, defendant's first attorney withdrew and his second appointed attorney entered an appearance. After entering his appearance, however, defendant's second appointed counsel failed to file an amended motion timely. The extension "for one additional period not to exceed thirty days" expired on November 23, 1989. Rule 29.15(f). Defendant's second attorney did not file his first amended motion until November 27, 1989, which was four days after the deadline. On that same day, defendant's second counsel also requested and later received an additional sixty days to file a second amended motion. But by this time he had already been granted his one authorized extension and had exceeded this extension as well as the overall sixty day time requirement of Rule 29.15. By granting the request for a second extension of time, the motion court exceeded its jurisdiction because Rule 29.15 clearly states that the court may grant only one extension not to exceed thirty days. Thus, the court had no jurisdiction to rule on defendant's first or second amended motions because they were all filed out of time. The motion court, therefore, should have dismissed the amended motions as untimely and proceeded on the issue of abandonment pursuant to *Sanders* if there was a request to do so after the dismissal.

ABANDONMENT

Once we have decided that the motion court had no jurisdiction to rule on the defendant's untimely amended motions, it becomes necessary to determine whether the defendant was abandoned by counsel. Because the motion court has already conducted a detailed *Sanders* hearing on this issue, we will examine the record and make a determination on the issue of abandonment.

The defendant argues that the motion court's finding at the *Sanders* hearing that White was not abandoned by post-conviction counsel was clearly erroneous because it was not

supported by the record. The basis of the motion court's decision was that it never had jurisdiction over defendant's pro se 29.15 motion because it was not properly verified. The court reasoned that it was impossible to abandon a cause that did not exist. As discussed earlier, we have already concluded that defendant's pro se motion properly invoked the jurisdiction of the motion court.

However, the motion court also reinstated its findings of fact and conclusions of law dated April 15, 1992. In those earlier findings, the motion court also concluded that there was no abandonment as a result of counsel's withdrawal, failure to file a timely amended motion, failure to verify, or failure to allege sufficient facts and grounds for relief. The court reasoned that: "A withdrawal with or without leave of court would be an abandonment if a new attorney was left too little time to accomplish his goals." The court then stated that since defendant's second attorney was given sixty days in which to file his amended motion, there was ample time to achieve the requirements of Rule 29.15(e). We have concluded, however, that the amended motions filed by defendant's second attorney were not timely. Thus, the motion court's determination that defendant's second appointed counsel had sixty days in which to file his amended motion is incorrect. Defendant's first and only extension authorized under Rule 29.15 extended the filing date to November 23, 1989. Defendant's first attorney withdrew on November 9, 1989. His second appointed attorney entered his appearance on that same day. That left defendant's second appointed attorney from November 9 to November 23 to file the amended motion. That left him fourteen days (excluding November 9), as opposed to sixty days as suggested by the motion court, to meet with the defendant, research all the possible grounds for relief, and draft the amended motion. This leaves serious question as to whether defendant was abandoned by his first attorney's withdrawal without permission from the motion court and his second attorney's failure to file an

amended motion timely.

In *Sanders v. State*, 807 S.W.2d 493, we were faced with the question of whether defendant's counsel's failure to file an amended 29.15 motion timely amounted to abandonment. On remand, we instructed the trial court that "[t]he burden shall be on the movant to demonstrate that the untimeliness is not the result of negligence or intentional conduct of the movant, but is due to counsel's failure to comply with Rule 29.15(f). If the court determines that the untimeliness resulted from negligence or intentional conduct of movant, the court shall not permit the filing" of an untimely 29.15 amended motion. *Id.* at 495. But if the untimeliness resulted exclusively from counsel's action or inaction, the court should consider movant's amended motion as if it was timely filed. *Id.*

We conclude that the untimely filing of defendant's amended motion was not the result of negligence or intentional conduct by White. Rather, the untimely filing resulted exclusively from the inaction of defendant's appointed counsel. The motion court made a similar finding, although it based its holding on other grounds, when it concluded "that no action or inaction by movant had any effect on]defendant's second counsel's] timing of the filing of the motion." In his affidavit, defendant White stated that: (1) he gave his second appointed counsel "all the information [he] had available to [him] to assist in the preparation of an amended motion," (2) he "did nothing to limit the content of the amended motion," and (3) he did "nothing to delay the filing." This was corroborated by the testimony of defendant's second appointed counsel at the *Sanders* hearing when he testified that: (1) he failed to file a timely motion because there was insufficient time for him to investigate, research and draft the motion, (2) nothing that White did or said or refused to do interfered with his ability to file a timely amended motion, and (3) it was the decision of the public defender's office, rather than White, "to switch

attorneys." Defendant's first appointed attorney confirmed that the decision "to switch attorneys" was made solely by the public defender's office. Based on the record, we conclude that defendant White was abandoned by the decision of the public defender's office to change defendant's counsel fourteen days before the end of the sixty day period for filing the Rule 29.15 amended motion without leave of court, by his first appointed counsel's withdrawal without leave of the motion court, and by both his first and second appointed counsel's failure to file a timely amended motion. We find that no action or inaction by White contributed to the delayed filing.

Rule 29.15(e) states: "For good cause shown, appointed counsel may be permitted to withdraw." At a minimum, this means that the motion court must enter an order finding good cause and granting permission for the exchange of counsel. No such order was granted in this case. Neither of defendant's appointed counsel should have participated in this exchange of counsel (1) without an order showing good cause, or (2) so near to the deadline for filing a timely amended motion. An attorney should not withdraw so close to the filing date that the second counsel has insufficient time to meet all the requirements of Rule 29.15. By his own admission, defendant's second counsel did not have enough time to file a timely amended motion after he entered his appearance. Moreover, the conduct of the public defender's office is at least questionable in removing defendant's first appointed counsel fourteen days prior to the filing date, especially since it was done without leave of the motion court. Although we pass no final judgment on either of defendant's attorneys or the public defender's office, we request that the Disciplinary Counsel investigate and determine whether any considerations or disciplinary rules were broken.[2]

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[2]All public defenders are required to be attorneys licensed to practice law in Missouri. § 600.021, RSMo 1986. We believe that Rule 29.15 permits the motion court to appoint a public defender's office or an individual attorney

Second, defendant argues that he was abandoned by counsel's failure to ensure that the motion was properly verified. As noted earlier, the amended motions met the verification requirement for the purpose of jurisdiction. Thus, the defendant was not abandoned in regard to the verification requirement. This is especially true since defendant's intentional conduct resulted in the verification being signed prior to the completion of the amended motions. *Sanders*, 807 S.W.2d at 495. This point is denied.

Finally, defendant argues that post-conviction counsel abandoned him by failing to allege sufficient facts and grounds for relief in his amended motions. This argument has no merit. Absent total abandonment, such as failure to properly file an amended motion as required by Rule 29.15(e), defendant has no

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to represent a movant. Rule 29.15 only states that the "court shall cause counsel to be appointed for the movant." It does not require that the court appoint a specific attorney to represent a movant in filing a 29.15 motion. The court, therefore, can appoint a public defender's office because that will "cause counsel to be appointed for the movant." Rule 29.15(f) (emphasis added). Moreover, this Court recognized the appropriateness of such an appointment in White, 813 S.W.2d at 864, citing Schneider, 787 S.W.2d at 720, when we held "that the effective date of appointment of counsel is the date on which the office of public defender is designated rather than the date of counsel's entry of appearance."

The public defender's office has requested, in certain instances, that the courts appoint one of its offices rather than a specific attorney to represent a movant pursuant to Rule 29.15. If the court appoints a public defender's office to represent a movant, we will hold the supervising attorney of that office responsible as if that attorney had been appointed individually to represent movant. Once an individual attorney from a public defender's office enters an appearance on behalf of a movant, we will also hold that attorney responsible as if appointed by name in the court's order. In this case, the "State Public Defender for the Sixteenth Judicial Circuit [was] appointed to represent movant in his motion for relief pursuant to Rule 29.15." Thus, the attorney in charge of that office should be held responsible for the conduct of the public defender's office in this case.

right to effective assistance of Post-conviction counsel. The United States Supreme Court has stated that there is no constitutional right to post-conviction counsel and that failure of the attorney to comply with procedural rules in a collateral proceeding falls on the shoulders of the defendant. *White*, 813 S.W.2d at 867 (Holstein, J., concurring), *citing Coleman v. Thompson* 501 U.S.____, 111 S.Ct. 2546 (1991). Thus, a defendant's right to post-conviction counsel exists only under Rule 29.15(e) and our holdings in *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991), and *Sanders*, 807 S.W.2d 493.

Rule 29.15 requires only that the attorney meet with the movant, ascertain whether sufficient facts supporting the grounds in the pro se motion are asserted, and ascertain whether the movant has included all grounds known to him as a basis for attacking the judgment and sentence. Rule 29.15(e). "If the motion does not assert sufficient facts or include all grounds known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and grounds." *Id.* Absent total abandonment of the requirements set forth in Rule 29.15, a defendant has no recourse under *Luleff* and *Sanders*.

Here, counsel met with White and ascertained that an amended motion needed to be filed but failed to file it properly, resulting in abandonment under *Luleff* and *Sanders*. Defendant acknowledges in his affidavit, however, that he told his second appointed counsel of all grounds known to him. Based on that information, defendant's second counsel filed an amended motion, which stated additional facts and grounds for relief pursuant to Rule 29.15(e). Neither the defendant nor his second appointed counsel testified at the Sanders hearing that the first or second amended motion failed to raise all grounds known to them at the time the motions were filed. Therefore, there is nothing in the record to indicate that defendant's second appointed counsel failed to met the minimum requirements set forth in Rule 29.15.

Even if White claims that his second counsel failed to raise all meritorious grounds known to White prior to the filing of the amended motions, defendant waived all challenges to the completeness and accuracy of the amended motions when he signed the verification in blank. We will not permit a movant to falsify a verification and then argue that the contents of the amended motion were insufficient. The defendant's st abandonment argument is denied.

ABANDONMENT REMEDY

Having concluded that the defendant was abandoned by post-conviction counsel's failure to file a timely amended motion, we must decide what remedy is available to the defendant. We have resolved this issue in two ways: (1) appointing new counsel to file an amended motion, or (2) instructing the motion court to treat the previously drafted amended motion as timely. The previous cases, however, have been procedurally different than this one in regard to whether an amended motion was filed and whether the court ruled on the amended motion. In *Luleff*, 807 S.W.2d 495, we remanded to the motion court to determine whether movant was abandoned by counsel's failure to file an amended motion. We instructed the court that if movant was not negligent or otherwise a party to his appointed counsel's failure to file an amended motion, the court should appoint new counsel to file an amended motion if counsel determines that there are any meritorious claims for relief. *See also State v. Bradley*, 811 S.W.2d 379 (Mo. banc 1991). In *Sanders*, 807 S.W.2d 493, where counsel drafted an amended motion but failed to file it timely, we instructed the motion court to treat the amended motion as timely if counsel was exclusively responsible for its late filing. Prior to the remand in *Sanders*, the motion court had dismissed the amended motion as untimely and did not rule on it. In this case, however, the motion court ruled on the untimely amended motions prior to the defendant's appeal.

Defendant contends that we should follow *Luleff* and allow the motion court to appoint new counsel to file a third amended 29.15 motion. The State persuasively argues, however, that in doing so we would permit the defendant a third bite at the apple, which would contravene the purpose of Rule 29.15. The State suggests that we dismiss both motions as untimely. Although we agree with the State that the second amended motion was properly dismissed as untimely, we reinstate defendant's first amended motion pursuant to *Sanders*.

Defendant White was only abandoned with regard to the timing of his first amended motion, not as to its content. In his affidavit, defendant White stated that he gave his appointed counsel all of the information he had with regard to filing an amended motion. Defendant also signed the verification in blank, which resulted in his waiving any claim that the amended motions were incomplete. Plus, neither the defendant nor his second appointed counsel testified at the *Sanders* hearing that the first amended motion did not contain all grounds known to them at the time it was filed. Defendant's counsel merely complained that the first amended motion was late because be was not given enough time. Therefore, defendant was not abandoned as to the content of his first amended motion. He was only abandoned as to the timeliness of his first amended motion. We, therefore, conclude that defendant's first amended motion should be reinstated.

The defendant is not entitled, however, to have his second amended motion reinstated. We have already determined that defendant was abandoned only by the late filing of his first amended motion. By reinstating the first amended motion, we have cured the timeliness problem, and the first amended motion now meets the minimum requirements of Rule 29.15. To let the defendant also have the benefit of the second untimely amended motion would grant the defendant additional relief beyond that which he was originally entitled to receive

under Rule 29.15. Defendant White only had the right to have his appointed counsel draft one amended motion that complied with the requirements of Rule 29.15(e). We are unwilling to grant the defendant any additional relief beyond that which is required by Rule 29.15. Therefore, we will not reinstate the defendant's untimely second amended motion.

Defendant contends, however, that the motion court failed to rule on all of defendant's points in his first amended motion. On remand, the motion court should determine the validity of this contention, which is similar to defendant's claim regarding his pro se motion. The motion court should have drafted findings and conclusions on all of the issues raised in defendant's pro se and first amended motions. On remand, the court should make findings of fact and conclusions of law in accordance with *Barry*, 850 S.W.2d 348.

Defendant also argues that he was denied his right to due process under the Missouri and United States constitutions because the prosecutor drafted the August 1, 1989, findings of fact and conclusions of law. Defendant further argues that the judge's alleged delegation of his duties to the prosecutor deprived White of his right under Article V, Section 1, of the Missouri Constitution to have his post-conviction motion decided by a court vested with judicial power.

Adopting all or part of a party's proposed findings, or adopting by reference the wording of a party's motion, has become a common practice among lawyers and judges in both criminal and civil cases. Courts frequently request both parties to draft findings of fact and conclusions of law that conform to how the court intends to resolve the issues in dispute. The court then takes the parties' recommendations under advisement and either drafts its own findings of fact and conclusions of law or adopts one of the parties' findings in whole or in part. As long as the court thoughtfully and carefully considers the parties'

proposed findings and agrees with the content, there is no constitutional problem with the court adopting in whole or in part the findings of fact and conclusions of law drafted by one of the parties. Once the trial court determines that it agrees with one of the parties' findings and signs the order, the court has in effect adopted that party's findings as its own.

It is clear from the record that the prosecutor drafted some or all of the August 1, 1990, findings of fact and conclusions of law. We find no constitutional violation regarding this practice as long as the trial court is satisfied that its findings of fact and conclusions of law reflect its independent judgment. Because there *was* no evidence presented that the findings and conclusions did not reflect the court's own independent judgment, this point is denied.

CONCLUSION

Defendant's appeal based on the failure of the motion court to rule on all the issues contained in his pro se and first amended 29.15 motions is reversed and remanded for further proceedings consistent with *Barry*, 850 S.W.2d 348.

ELWOOD L. THOMAS, Judge

All concur.

SUPREME COURT OF MISSOURI
en banc

LEAMON WHITE,	)	**FILED**
	)	**FEB 25, 1997**
Appellant,	)	
	)	
v.	)	**No. 78459**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Appeal from the Circuit Court of Jackson County
Honorable Alvin C. Randall, Judge, and Honorable David W. Shinn, Judge

Leamon White was convicted of first degree murder and sentenced to death. This is an appeal from a judgment denying relief pursuant to a motion to vacate judgment and sentence under Rule 29.15. White's primary contention is that his trial attorneys were ineffective in their investigation and presentation of witnesses, conduct of voir dire; sentencing phase strategy, and that they sought to undermine his chances for post-conviction relief in order to insulate themselves from criticism for their deficient performance. Without holding an evidentiary hearing, the circuit court overruled White's Rule 29.15 motion. We find that none of the numerous allegations made by White in his motion for post-conviction relief require an evidentiary hearing. The judgment of the circuit court is affirmed.

I.

White's Rule 29.15 motion has been before this Court on two prior occasions. In the first appeal, *State v. White*, 813 S.W.2d 862 (Mo. banc 1991), *cert. denied*, 502 U.S. 1103

(1992), the facts were set out at length. To summarize, in January 1987, three men entered the home of Don Wright and Carol Kinney, purportedly to buy crack cocaine. Instead, the men tied up Wright, Kinney and her children, Deonta and Raymond, and Earnest Black, a guest in the home. The men beat Mr. Black and Mr. Wright, interrogating them about where to find drugs. Then the men slit Mr. Wright's and Ms. Kinney's throats and left the house, after turning on the gas stove and blowing out the pilot lights. As a result of the savage attack, Don Wright died of strangulation and asphyxiation. The children, who were in bed in a nearby bedroom during the attack, were later able to free themselves and call police. At trial, Ms. Kinney and Mr. Black identified Leamon White as one of the attackers. White was convicted of first degree murder and sentenced to death. On appeal, this Court affirmed the conviction and sentence.

In that opinion, the Court described the circumstances surrounding the filing of White's various motions for post-conviction relief. In August 1989, White filed a pro se motion under Rule 29.15, but failed to have it notarized, apparently because no notary was available to him in prison. The motion court appointed counsel, who later requested an extension of time to file an amended motion. About two weeks before the extension expired, the first attorney withdrew, and another was appointed. Several days after the extended filing period had expired, the newly appointed attorney filed a first amended motion and an application for a further extension of time. That extension was granted, and a second amended motion was filed. The motion court issued a judgment, which included findings of fact and conclusions of law denying relief without an evidentiary hearing on August 1, 1990. Without addressing the motion court's substantive judgment, this Court remanded for findings on whether White had been abandoned by post-conviction counsel.

On remand, the circuit court dismissed the Rule 29.15 motion as not properly verified. In the alternative, the court determined that White was not abandoned by post-conviction counsel and reinstated the original findings and conclusions overruling the motion on the merits. White again appealed the judgment.

In the second appeal, *State v. White*, 873 S.W.2d 590 (Mo. banc 1994), this Court ruled that White's signature was sufficient verification for the pro se Rule 29.15 motion. However, the Court found both amended motions to be untimely because the motion court lacked jurisdiction to grant more than the prescribed thirty-day extension. But this Court reinstated the first amended motion because it concluded that trial counsel's failure to file a timely amended motion constituted abandonment. The Court, however, refused to reinstate the second amended motion, holding that White only had the right to one amended Rule 29.15 motion drafted by counsel. The Court also found that the motion court had failed to address all claims set forth in the pro se and first amended motions. Accordingly, the Court remanded for findings of fact and conclusions of law addressing all claims in the pro se and first amended motions.

On remand, the motion court found that the issues raised in the first amended motion had been addressed in the first judgment on August 1, 1990, and entered new findings of fact and conclusions of law on the claims made in the pro se motion, denying all relief without an evidentiary hearing.

This Court now considers only the motion court's rulings on the allegations contained in White's pro se and first amended Rule 29.15 motions. Review of the rulings is limited to determining whether they are clearly erroneous. *Rule 29.15(j)* (1988). Where the trial court makes findings of fact and conclusions of law, a proper result will be affirmed even if one

of the conclusions is in error. *State v. Bradley*, 811 S.W.2d 379, 383 (Mo. banc 1991) (per curiam).

II.

White argues that the trial court erred in refusing to grant an evidentiary hearing on the numerous claims of ineffective assistance of counsel raised in his Rule 29.15 motions. An evidentiary hearing is not required where "the motion and the files and record of the case conclusively show that movant is entitled to no relief[.]" *Rule 29.15(g)* (1988).

A Rule 29.15 motion is subject to requirements of timely filing and limitations on amendments. *Rule 29.15(b)(f)* (1988). Moreover, such motion must be substantially in the form provided by Form 40. *Rule 29.15(b)* (1988). Paragraph 8 of Form 40 requires a movant to state "concisely all the grounds known to you for vacating, setting aside or correcting your conviction and sentence." Paragraph 9 of Form 40 requires a concise statement of "the facts which support each of the grounds set out in (8), and the names and addresses of the witnesses or other evidence upon which you intend to rely[.]" Once counsel is appointed, "[i]f the motion does not assert sufficient facts... counsel shall file an amended motion which sufficiently alleges the additional facts and grounds." *Rule 29.15(e)*. The redundant requirement to plead facts makes clear that a Rule 29.15 motion is no ordinary pleading where missing factual allegations may be inferred from bare conclusions or implied from a prayer for relief.

A Rule 29.15 motion is treated differently than pleadings in other civil cases because it is a collateral attack on a final judgment of a court. While courts are solicitous of post-conviction claims that present a genuine injustice, that policy must be balanced against the policy of bringing finality to the criminal process. Requiring timely pleadings containing

reasonably precise factual allegations demonstrating such an injustice is not an undue burden on a Rule 29.15 movant and is necessary in order to bring about finality. *See Fields v. State*, 572 S.W.2d 477. 483 (Mo. banc 1978). Without requiring such pleadings, finality is undermined and scarce public resources will be expended to investigate vague and often illusory claims, followed by unwarranted courtroom hearings. For that reason, it has been held that no evidentiary hearing will be required unless the motion meets three requirements: "(1) the motion must allege facts, not conclusions, warranting relief; (2) the facts alleged must raise matters not refuted by the files and records in the case; and (3) the matters complained of must have resulted in prejudice to the movant." *State v. Starks*, 856 S.W.2d 334, 336 (Mo. banc 1993). Thus, to obtain an evidentiary hearing on claims of ineffective assistance of counsel, the movant must allege facts, not refuted by the record, showing (1) that counsel's performance did not conform to the degree of skill, care, and diligence of a reasonably competent attorney, and (2) that he was thereby prejudiced. *See Hill v. Lockhart*, 474 U.S. 52, 60 (1985); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because none of White's allegations satisfy this standard, his motion was properly overruled without an evidentiary hearing.

A.

White alleges counsel was ineffective in that:

> [He] required and compelled movant to take the witness stand.., to condone, verify and/or sanction trial counsels [sic] trial strategy, i.e., what witnesses to call, what questions to ask and what evidense [sic] to marshall [sic] in general. This improper conduct of counsel impermissably [sic] invaded the provence [sic] of the attorney cliant [sic] relationship and

exposed movant to cross-examination by the state. Said conduct was prejudicial to movant.

The pleadings purport to allege improper conflict of interest between movant and trial counsel. Inherent in every criminal case is counsel's desire to protect himself from future claims of ineffective assistance of counsel and the defendant's desire to preserve claims of ineffective assistance of counsel in the event of conviction. It is not improper for counsel to take steps to protect his own interest if in doing so, he does not disclose confidences of his client which harm the client's interest. There is no per se rule that prejudice will be presumed when counsel makes a record that has the effect of refuting subsequent claims of ineffective assistance of counsel. As with other matters, a post-conviction pleading asserting ineffective assistance of counsel must allege facts showing what counsel did or said that was improper and facts showing how the movant was prejudiced. Here counsel is faulted for having asked movant on a number of occasions if movant agreed with unspecified strategic decisions of counsel. Aside from conclusions, no specific information disclosed by the questioning is alleged in the pleadings. Neither is there any allegation as to how such disclosure might have harmed movant so as to undermine confidence in the outcome of the trial.

Such conclusions, without more, do not assert either ineffective representation or prejudice. Movant did not plead facts entitling him to relief on this issue. Thus, he was not entitled to an evidentiary hearing.

B.

White alleges he was denied effective representation of counsel because one of his attorneys represented other, unrelated, capital defendants simultaneously. He alleges that one of his trial attorneys "was unable to devote his full time and

attention to movants [sic] trial due to proceedings being conducted in other forums at the same time as movants [sic] trial, thus resulting in [the attorney] leaving movants [sic] murder trial while court was in session to attend other proceedings." In denying this claim, the motion court concluded:

> [M]ovant's allegation... fails to allege how he was prejudiced by counsel's representation of other clients while movant's trial was in progress, nor has movant alleged any facts regarding counsel's supposed conflict of interest. Movant's allegation is especially meritless considering that he was also represented at trial by [a second attorney], about whom movant has not made any allegation of conflict of interest.

This conclusion is not clearly erroneous as appellant's contention is refuted by the record. White fails to acknowledge the fact that he was represented by two trial attorneys. White's claim would lead one to incorrectly believe he was represented by only one. White fails to challenge co-counsel's representation during the periods in which one of his attorneys was allegedly absent. White also fails to set forth with specificity how he was prejudiced by the attorney's absence. The motion court properly rejected this claim without a hearing.

C.

White contends trial counsel was ineffective in the following regard:

> [C]ounsel engaged in unethical and improper conversation with the victims [sic] immediate family members. Said conversations involved discussions by defense counsel concerning the

> merits of movants [sic] defense and movants [sic] trial strategy, all to the prejudice of movant. Defense counsel knowingly violated the attorney-cliant [sic] relationship by divulging the aforestated, and this conduct is move [sic] grevious [sic] when defense counsel knew or reasonably should have known that the victims [sic] family members were relaying all information to the States [sic] attorney.

The motion court rejected White's claim on the basis that no showing of prejudice was made. The court properly denied an evidentiary hearing on this claim as White's allegations are merely conclusions and speculation.

By reading the pleadings, one is unable to discern what was said by counsel that was unethical or improper or what tidbits of trial strategy were communicated that might conceivably have prejudiced the movant. White's own brief demonstrates the speculative nature of the claim where he says,

> *If* Mr. White's attorney was, in fact, discussing the merits of Mr. White's defense, and his trial strategy with members of the family and *if* he knew, or reasonably should have known, that the family members were conveying that information to the prosecutor, *then* counsel was guilty of an unethical breach of loyalty to his client.

(Emphasis added.) To obtain an evidentiary hearing, a movant must allege facts, not speculative conclusions, warranting relief. *Starks*, 856 S.W.2d at 336. As White does not specify what was disclosed to the victim's family members, he fails to show that but for the disclosures, the outcome of the trial may have been different. Because of the failure to allege these facts, the motion

court properly denied the claim.

D.

White contends that counsel was ineffective for failing to conduct pre-trial interviews or depositions of key witnesses, including Carol Kinney, Earnest Black, Deonta Kinney, and Raymond Kinney.

In its findings of fact and conclusions of law, the motion court found that defense counsel adequately utilized alternatives to conducting interviews and depositions of the eyewitnesses:

> In this case, while defendant's attorney's [sic] had not talked to the eyewitnesses in this case or deposed them, they had statements given by those witnesses in the police reports, as well as depositions given by those same witnesses in the defendant's and co-defendant's cases[,] either of which could have been used to impeach those witnesses if they thought it the correct strategy to utilize. The trial transcript is replete with instances with which defense counsel used these depositions and police reports to impeach the State's witnesses.

No challenge is made to the trial court's finding of the existence of depositions from other cases and police reports containing statements of the witnesses. The record plainly supports the motion court's finding on this issue. In view of the availability of depositions from other related cases and statements of witnesses in investigative reports, the motion court correctly found that the attorneys' failure to interview and depose witnesses does not amount to ineffective assistance of counsel. There is a strong presumption that counsel made all significant decisions in the exercise of reasonable professional

judgment. *State v. Stepter*, 794 S.W.2d 649, 657 (Mo. banc 1990) (citing *Strickland*, 466 U.S. at 689). White has failed to allege facts that take this case outside the presumption that his attorneys' decision not to conduct a more probing investigation of the witnesses was something other than a reasonable choice of strategy.

In addition, the pleadings fail to allege facts that, if true, would entitle movant to relief. Specifically, White fails to identify what the attorneys would have discovered, that was not otherwise known to trial counsel, had they interviewed and deposed the witnesses. White argues in his brief on appeal that had his attorneys interviewed and deposed Raymond and Deonta Kinney, counsel would have discovered that the children had identified another man, A.J., as the killer. However, the motion suggests only that one of three assailants was not movant. How that exculpates movant is not explained.

Finally, the trial transcript directly refutes an inference that White's trial attorneys were unaware of what the children knew about the crime. Raymond Kinney was called to testify as a defense witness. Raymond testified that he and Deonta were in bed when the incident took place. Their bed was in a separate room from where the assaults and murder took place. The lights were off in the bedroom. Raymond saw one assailant and that person spoke with a Jamaican accent. Raymond further testified that the defense attorneys had brought him to court on a previous occasion to look at White and at that time Raymond did not recognize White. Apparently, White's counsel was aware that Raymond would testify favorably and had seen and talked to him prior to trial. These facts refute White's suggestion that his attorneys failed to interview the children or take steps to determine what the children knew about the crime.

Because White failed to allege what facts, if any, would have been developed by a more extensive interview or

deposition of witnesses and how that would have aided movant, the pleading fails to allege facts entitling him to relief on these grounds. Moreover, the claim is refuted by the record.

F.

In his first amended motion, White makes the following allegations:

> D. That counsel *failed to... adduce testimony* from [Ben] Kinney during trial that the victim of the murder, Don Wright. or his girlfriend - eye witness [sic] and co-victim, Carol Kinney were drug dealers of cocaine to establish that others could have committed these offenses[.]
>
> E. That counsel *failed to adduce testimony* from Ben Kinney that Ben Kinney and Don Wright sold drugs for two men by the names of AJ and Josh; this was relevant because AJ and Josh had threatened Ben Kinney and Raymond and Deonat [sic] Kinney had identified AJ as the second perpetrator of this murder: this cor flicted with Carol Kinney and Earnest Black saying that the second perpetrator was Movant[.]
>
> F. That counsel *failed to adduce testimony* from Deonat [sic] and Raymond Kinney that AJ was the second perpetrator of this murder not Movant[.]

(Emphasis added.)

All three paragraphs assert the obvious and irrefutable truth that defense counsel "failed to adduce testimony" favorable to movant. The question remaining is whether the bare allegation of counsel's failure to adduce certain testimony entitles movant to any relief. Clearly, the answer is no. "[T]o prevail on a claim of ineffective assistance of counsel due to counsel's failure to call a witness to testify, the movant must show that the witness would have testified if called and that the witness's testimony would have aided the movant's defense." *State v. Johnson*, 901 S.W.2d 60, 63 (Mo. banc 1995). The burden is on movant to plead facts, not conclusions, establishing not only who the witnesses were but what they would testify to, if called, and that such evidence would provide a viable defense. White's pleadings stop short of directly alleging what the witnesses would testify to, if called. As such, they are deficient and no hearing was required on these claims.

The requirement that a movant directly allege facts to which the witnesses would have testified, if called, is more than a technicality. In every post-conviction case, it may truthfully be said that there are innumerable witnesses whose favorable testimony on a myriad of issues was not adduced by trial counsel. The subtle wording "counsel failed to adduce" suggests what witnesses might say without directly stating that they were available and would have testified favorably to movant, if called. To declare such pleading to be sufficient would permit a post-conviction litigant and lawyer to sandbag the State and the motion court with numerous unsubstantiated claims of deficient performance of trial counsel in failing to "adduce" testimony from witnesses. The State would then be put to the task of having to investigate what the witnesses would say, and the court would be required to hold a hearing, even though there may not be a scintilla of evidence that the witnesses were available to testify and that they would, in fact, testify favorably to the movant. Meanwhile, the post-conviction movant and the post-conviction counsel could truthfully say they had made no

misrepresentation of fact to the court, which would subject them to sanctions under the Rules of Civil Procedure or, in the case of a lawyer, sanctions pursuant to the Rules of Professional Conduct.[3] To hold such allegations sufficient would turn the pleadings process into clever gamesmanship.

Finally, even if one assumes the motion alleged that one or both of the Kinney children, if called to testify, would have identified A.J. as one of the three assailants, the allegations are still insufficient. All that may be said of such assumed testimony is that one of three assailants was not movant. No facts are asserted showing movant was not one of the other two persons who committed the murder, and no facts alleged explain how the testimony of the children would tend to exculpate White.

F.

White alleges that "counsel failed to attack the pretrial identification of Movant by Carol Kinney or the in-court identification of Movant by Carol Kinney or Earnest Black by way of a Motion to Suppress when the identification procedures utilized by police were unnecessarily suggestive and conducive to an irreparable mistaken identification[.]" What these allegedly "suggestive and conducive" procedures were,

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[3]Rule 55.03(b) provides in part: "By presenting or maintaining a claim . . . in a pleading, . . . an attorney or party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that:

. . . .

(3) the allegations and other factual contentions have evidentiary support. . ."

Rule 4. Rules of Professional Conduct 3.1 provides in part: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous. . ."

however, is not specified in the motion. The motion fails to provide sufficient factual allegations to support the conclusion that the police used improperly suggestive identification. As such, the pleading is deficient and this claim was properly denied without a hearing.

G.

White alleges that his trial attorneys were ineffective because they failed to impeach witnesses Black and Kinney with "prior inconsistent statements." This allegation, even if true, is insufficient to warrant relief.

Failure to impeach a witness with a prior inconsistent statement does not, per se, constitute deficient performance of counsel. *See, e.g., Roberts v. State*, 775 S.W.2d 92. 9495 (Mo. banc 1989), *cert. denied*, 494 U.S. 1039 (1990). A defense attorney may decide not to impeach a witness as a matter of trial strategy. *Id.* White's pleadings fail to specify the nature or content of the alleged "prior inconsistent" statements. A bare allegation that certain witnesses made "prior inconsistent" statements without stating what was said and how it conflicted with what was testified to at trial is a conclusion, not a fact. Many inconsistent statements are so insignificant as to be meaningless and others are so easily explainable as to not justify being presented at trial. Because White fails to disclose the content and circumstances of the supposed inconsistent statements, he provides no factual basis for a finding of either inadequate representation or prejudice under the *Strickland* test. Because White failed to allege facts entitling him to relief, the motion court properly denied this point without an evidentiary hearing.

Moreover, the record refutes White's claim that his attorneys failed to impeach Carol Kinney and Earnest Black with prior inconsistent statements. The trial transcript reveals

several instances in which both Kinney and Black were questioned about prior inconsistent statements given to police, to an investigator or at a deposition, if White's claim is that his attorneys were ineffective in failing to go far enough in impeaching Kinney and Black, it must be rejected because the *extent* of impeachment is a decision of trial strategy. *See Kenley v. State*, 759 S.W.2d 340, 349 (Mo. App. 1988) (per curiam), *rev'd on other grounds sub nom. Kenley v. Armontrout*, 397 F.2d 1298 (8th Cir. 1991). In virtually every case, the extent of cross-examination must be left to the judgment of counsel. *Id.* The old adage among trial lawyers that "you only need to prove a witness is a liar once" has particular application here.

H.

White contends that counsel was ineffective in his cross-examination of witness Earnest Black, resulting in the witness identifying appellant as one of the perpetrators. White also alleges that counsel was ineffective in not making a motion to suppress the in-court identification. On this claim, the motion court concluded as follows:

> It is clear from the transcript that counsel's cross examination of Black was precisely in line with the trial strategy of misidentification. Black identified movant in-court [sic] on direct examination and it was clearly counsel's strategy to draw attention to the fact that Black had never been able to identify him before. It is also difficult to see how movant was prejudiced by this questioning since Black had already identified movant on direct as had Carol Kinney both before and at trial. At most. therefore, Black's response to counsel's questions was cumulative.

The ruling of the motion court is not in error. White has not alleged facts that would warrant relief if true. Review of the record demonstrates that defense counsel sought to show that the witness had misidentified White. Black had testified on direct examination that White "looks like the second man" involved in the murder. Counsel's cross-examination of Black regarding his confidence in his identification of White as one of the perpetrators was consistent with defense counsel's misidentification theory. Counsel's decision to cross-examine Black in this manner was a strategy decision, which will not support a finding of ineffective assistance. *See State v. Storey*, 901 S.W.2d 886, 893 (Mo. banc 1995). Furthermore, in light of Mr. Black's and Ms. Kinney's other identifications of White, the cross-examination complained of by White would not have resulted in prejudice.

I.

White alleges that counsel was ineffective for failing to object to the presentation, at trial, of a videotape lineup in which he was identified by State's witnesses before trial. White's reliance on *State v. Seever*, 733 S.W.2d 438 (Mo. banc 1972), is misplaced. In *Seever*, the State's witness, a child, made a videotaped statement detailing her account of defendant's sexual contact with her. At trial, the State called the victim to testify, after playing her videotaped statement for the jury. The Court held that the showing of the video was improper bolstering. *Id.* at 441. Unlike *Seever*, the videotape at issue in this case was not testimony offered to duplicate that ora witness. Rather, the videotape was admissible evidence of the circumstances of the initial out-of-court identification. The motion court did not err in finding that the trial court would have overruled this objection. Trial counsel cannot be deemed ineffective for failing to object to admissible evidence. *See Clemmons v. State*, 785 S.W.2d 524, 529 (Mo. banc 1990), *cert. denied*, 498 U.S. 882 (1990).

J.

White argues that his attorneys were ineffective in failing to call an expert to testify on the effect of drug use on the mind in regard to receiving, processing and interpreting information. According to White, "[h]ad counsel presented said expert testimony[,] the jury could have reasonably found that the incourt [sic] identification of movant was not reliable due to the witnesses [sic] admitted drug consumption and influence at the cogent times."

White fails to allege sufficient facts to establish that trial counsel's performance was deficient. "To support a charge of ineffective assistance of counsel based on failure to secure the testimony of an expert witness, at a minimum, movant is required to show what the evidence would have been." *State v. Twenter*, 818 S.W.2d 628, 636 (Mo. banc 1991). Here, White does not specify what an expert's testimony would have been, but speculates that upon some presumed testimony the jury "could have easily found" the in-court identifications unreliable.

White also fails to allege facts establishing prejudice. White's attorneys made drug use of the witnesses an issue without expert testimony. Both Ms. Kinney and Mr. Black admitted on the stand that they had taken drugs before the killing and were cross-examined on the issue of how the drug use affected their perceptions. Thus, even if true, this allegation does not entitle White to relief as it fails both prongs of the *Strickland* test.

K.

White claims that "counsel failed to object to the State withholding and supressing [sic] evidense [sic]" that "[t]he State had shown witness[es] Kinney and Black a photograph of

[White] prior to these witnesses making an identification. . . ." But, as White says in his motion, this allegedly withheld evidence came to light during trial. As the motion court found, both Ms. Kinney and Mr. Black were cross-examined on their failure to identify White from the photograph. Furthermore, White admits that his attorneys were informed about the photo by his previous attorney. Thus, White fails to allege facts establishing that he was prejudiced by his counsel's failure to object to the State's alleged withholding of evidence. The motion court did not err in denying this point without an evidentiary hearing.

L.

In White's pro se motion, he claims that his trial counsel was ineffective for failing to call an alibi witness. This allegation again fails to allege facts entitling movant to relief. White provides no details other than the name of the witness and the unsupported claim that the witness would provide an alibi. White fails to set forth what the alleged witness would testify to, if called, and fails to describe how the witness's testimony would provide an alibi. White has failed to allege any facts showing (1) that the witness could have been located through a reasonable investigation, (2) what the witness would have testified to if called, and (3) that the witness's testimony would have provided a viable defense. *State v. Ramsey*, 864 S.W. 320, 340 (Mo. banc 1993), *cert. denied*, 511 U.S. 1078 (1994). As such, the motion court did not err in denying an evidentiary hearing on trial counsel's failure to call White's alleged alibi witness.

M.

White alleges that counsel was ineffective for "fail[ing] to object to the court informing members of the venire that the governor could pardon Movant[.]" White's claim that the trial

court erred in giving such an instruction was rejected on direct appeal. *White*, 813 S.W.2d at 865. Thus, the motion court did not err in finding that an objection to the court's statement would have been meritless.

N.

White contends that counsel rendered ineffective assistance upon failing to object to the State's improper voir dire, wherein the prosecutor did not limit the questioning to the general circumstances of the offense but instead provided specific details in order to predispose the jurors. "We do not permit counsel . . . to try the case on voir dire by presentation of the facts in explicit detail." *State v. Antwine*, 743 S.W.2d 51, 58 (Mo. banc 1987), *cert. denied*, 486 U.S. 1017 (1988). However, a revelation of some portion of the facts of a case during voir dire is necessary to ascertain whether a potential juror's views would substantially impair his ability to be impartial and perform his duties in accordance with the court's instructions. *State v. Gray*, 887 S.W.2d 369, 382 (Mo. banc 1994), *cert. denied*, ___U.S.___, 115 S.Ct. 1414 (1995). White "fails to identify any statements by the State that were either argumentative or prejudicial in the context in which they were made." *Antwine*, 742 S.W.2d at 59. Without alleging any facts showing prejudice, White fails to establish that the State's voir dire was improper. *See id.* Hence, failure to object to the State's voir dire cannot provide a basis for a claim of ineffective assistance of counsel. The motion court properly denied this point.

O.

White contends that trial counsel was ineffective in that he wasted a peremptory strike on a venireperson the trial court had already excused for cause due to illness. White fails to allege prejudice based on counsel's use of the peremptory strike.

He must allege facts demonstrating that but for counsel's allegedly deficient performance, the result of the trial would have been different. *See Storey*, 901 S.W.2d at 893. Because White makes no such allegation, White is entitled to no relief on this claim.

P.

White alleges that "counsel failed and refused to conduct any meaningful voir dire examination, and failed and refused to make any objections... to the states [sic] request for jurors being struck for cause. . . . Counsel also failed to make any effort to rehabilitate potential jurors who spoke ambiguously as to their position concerning the imposition of the death penalty." White, however, fails to specify what was deficient about counsel's voir dire examination. The motion is also silent as to which strikes counsel should have objected to, and which jurors counsel should have attempted to rehabilitate. Because White has failed to plead any specific information, his pleading does not warrant relief.

However, the motion court found that White had alleged sufficient facts to allow a judgment on this issue as to one juror. The court further found that this juror had expressed a substantial inability to impose the death penalty and was properly struck for cause. The juror in question said that he was opposed to the death penalty for religious reasons and could not consider the death penalty. It was proper to strike this juror for cause. *See State v. Six*, 805 S.W.2d 159, 166 (Mo. banc 1991), *cert. denied*, 502 U.S. 871 (1991). The motion court did not err in concluding that objecting to the strike of this juror would have been fruitless.

Q.

White alleges counsel's ineffectiveness for failing to

object to the trial court's voir dire examination wherein the court asked whether jurors could consider sentencing White to death, rather than asking whether they could consider the entire range of punishment. The record clearly refutes White's claim. The court examined certain venirepersons on their ability to consider the range of punishment. The court examined several venirepersons, using essentially the same phrasing each time: "if the jury finds the defendant guilty of murder in the first degree, the only possible sentences are life in prison without parole and the death sentence. Would you be able to consider both of those punishments?" Thus, the record refutes White's allegation by reflecting that the court asked whether the venireperson could consider the range of punishment. The motion court properly denied this claim.

R.

White contends that counsel was ineffective in not challenging the fact that voir dire had been conducted off the record, by a judge other than the trial judge, and without appellant being present. White alleges that, as a result, he "was denied a full and complete transcript from which to perfect his appeal." This allegation is clearly refuted by the record, which includes a transcript of the voir dire proceeding. White does not specify what portions of the voir dire proceeding are missing from the trial transcript. Though White alleges that he was not present at some portion of the voir dire, he fails to identify at what stage he was purportedly absent. He does not contend that he was not present for any portion of the general or death qualification phases of the voir dire. Therefore, as the motion court concluded, White does not allege prejudice with any specificity and his claim, therefore, does not warrant a hearing.

S.

White contends that counsel rendered ineffective

assistance "when counsel failed and refused to properly object to the court reading instructions to the jury, that only became proper at the close of evidense [sic], during voir dire." The motion court concluded the claim was meritless, finding:

> [T]he transcript clearly shows that all instructions were read at the appropriate time, and movant has failed to show how this has prejudiced him. The only instruction which was read at an irregular time was the instruction explaining what an objection being sustained meant, which was reread, because a juror didn't understand it the first time it was read.

Without identifying the instruction that was purportedly improperly read, and without any supporting authority, White contends that the motion court's finding is clearly erroneous and that "without a hearing it is impossible to know why counsel failed to object and whether the jurors unduly emphasized this instruction to Mr. White's detriment." The record reveals no patently improper instruction during voir dire. White fails to allege facts, not refuted by the record, warranting relief. In the absence of such factual allegations, he is not entitled to an evidentiary hearing.

T.

White contends that counsel was ineffective in not making a proper objection during voir dire when the State's attorney advised the jury of his opinion as to what constituted first degree murder, thereby placing impermissible legal theories before the jury.

The motion court correctly concluded that counsel's objection to the State's comments would have been overruled. It is clear from the page of the transcript that movant references

that, at most, the prosecutor gave an example of the types of crime that would carry a possible death sentence. Nowhere does the prosecutor say what he thinks first degree murder is. Moreover, White fails to allege facts establishing that he was prejudiced by the prosecutor's comment.

U.

White alleges that counsel "failed to take the necessary steps to preclude the jury, witnesses and the general public from being able to overhear each and every bench conference . . . [which] without question prejudiced" him. White does not, however, describe the substance of the bench conferences. The motion court correctly found that this allegation was insufficient because White fails to specify the allegedly prejudicial substance of the bench cónferences. The court did not err in denying a hearing on this issue.

V.

White alleges that "counsel failed and refused to reques that the court instruct the jury on the lesser included offenses of second degree murder and manslaughter when ch instructions were supported by the evidence." A court is required to instruct on lesser included offenses only if the evidence provides a basis for both an acquittal of the greater offense and a conviction of the lesser offense. *§556.046,* RSMo 1994; *State v. Mease,* 842 S.W.2d 98, 110-11 (Mo. banc 1992), *cert, denied,* 508 U.S. 918 (1993). White fails to point to any evidence that provides a basis for both an acquittal of first degree murder and a conviction of lesser offenses of second degree murder and manslaughter. Therefore, he has failed to allege facts showing that had counsel requested the instructions on these lesser included offenses, the instructions would have been given.

W.

White alleges that his counsel was ineffective for failing to object to the mitigating circumstances instruction given to jurors at the penalty phase of his trial because it was contrary to *Mills v. Maryland*, 486 U.S. 367 (1988), which held that jurors could not be confined to consideration of mitigating circumstances that the jury found unanimously. *Id.* at 375. In his motion and brief, White fails to specify which instruction violated *Mills* and how it was violated. This Court can find no such error. Because no mitigating circumstances were presented, the following modified version of MAI-CR3d 313.46 was given regarding the death penalty:

> You are not compelled to affix death as the punishment even if you have found existence of one or more aggravating circumstances. You must consider all the circumstances in deciding whether to assess and declare punishment of death. Whether that is to be your final decision rests with you.

This instruction clearly does not violate the mandate of *Mills*.

X.

White claims that the trial counsel was ineffective for "fail[ing] to object to all aspects of the State's penalty phase argument since at no time was the argument directed to those aspects of this crime or this Movant which would justify a sentence of death[.]" This allegation fails to specify how the State's penalty phase argument violates the "wide latitude" allowed in such arguments. *State v. Shurn*, 866 S.W.2d 447, 463 (Mo. banc 1993), *cert. denied*, __ U.S.___ ,115 S.Ct. 118 (1994). White fails to plead facts demonstrating that counsel's objection would have been meritorious.

Y.

White alleges that his trial counsel was ineffective "[w]hen counsel failed to request the court to instruct the jury that the testimony of a drug addict should be taken with care and caution." White fails to identify which witnesses he claims to be drug addicts in this paragraph of his motion. Moreover, White fails to cite any authority establishing that, if a witness were shown to be a drug addict, White would be entitled to such an instruction. Ordinarily, judges are forbidden from making comments on the evidence. Thus, White's allegation, even if true, would not warrant relief.

Z.

White claims that his counsel was ineffective for failing to object to the imposition of the death penalty in that Missouri's death penalty statute places unconstitutional discretion in the prosecutor. This Court has already rejected this constitutional claim. *See State v. McMillian*, 783 S.W.2d 82, 101-02 (Mo. banc 1990), *cert. denied*, 498 U.S. 881 (1990). The motion court did not err in finding that had trial counsel objected, the trial court would have properly overruled the objection."

AA.

White alleges that counsel provided ineffective assistance in failing to object to the State's opening statement wherein the prosecutor said that the evidence would show that White was involved in an ongoing and existing conspiracy.

The prosecutor's opening statement was not improper. White was charged with knowingly causing the death of Don Wright "by asphyxiating, cutting and stabbing him" and that such crime was committed by White "either acting alone or knowingly in concert with others . . ." One of the purposes of the opening statement is to inform the defendant of the

contemplated course of the prosecution to enable him to fairly meet the charges. *State v. Murray*, 744 S.W.2d 762, 774 (Mo. banc 1988), *cert. denied*, 488 U.S. 871 (1988). References during opening statement to arguably admissible evidence made in good faith with a reasonable expectation that the evidence will be produced are not grounds for reversal. *State v. Harris*, 870 S.W.2d 798, 809 (Mo. banc 1994), *cert. denied*, ___ U.S.___, 115 S.Ct. 371 (1994). Review of the trial transcript refutes White's contention that no evidence supported the prosecutor's statement that White conspired with others. Evidence was adduced from which it may be inferred that White and his two accomplices perpetrated a planned robbery and murder. Here, the prosecutor's opening statement was not improper because it placed before the jury and the defense the State's theory of the case. *See id.* Hence, this claim does not entitle White to any relief.

BB.

White alleges that counsel was ineffective in allowing the victim's mother and brother to remain in the courtroom, thereby allowing them to alter their expected favorable testimony. Neither witness was called to testify at trial. White does not state how the witnesses' expected testimony was changed. As the motion court correctly found, White fails to show how he was prejudiced by the presence of these witnesses in the courtroom.

CC.

Subject to certain exceptions, a motion court must issue findings of fact and conclusions of law on all issues presented. *Barry v. State*, 850 S.W.2d 348, 349-50 (Mo. banc 1993); *Rule 29.15(i)* (1988). White claims that the motion court did not address three of his claims.

Contrary to White's contention, the motion court did in fact enter findings and conclusions on White's allegations relating to failure to interview State's witnesses and failure to object to the judge's statements regarding the governor's authority to pardon. These claims are addressed above.

White also alleges that counsel was ineffective when "counsel, without movants [sic] consent or knowledge, agreed to allow the trial court to instruct the jury that in a previous case. another defense attorney had in fact lied and misled a previous jury."

The motion court apparently did not address this one allegation of ineffective assistance of counsel. While *Barry* concludes that Rule 29.15 requires findings of fact and conclusions of law on every issue, it also acknowledges that not every failure to enter a finding of fact or a conclusion of law requires reversal and remand. 850 S.W.2d at 350. There are some common sense exceptions. For example, no finding of fact is necessary where the only issue is one of law. *Id.* In addition, an appellate court will not order a useless remand to direct the motion court to enter a proper conclusion of law on an isolated issue overlooked by the motion court where it is clear that the movant is entitled to no relief as a matter of law and will suffer no prejudice by being denied a remand. *See State v. Stallings*, 812 S.W2d 772, 779 (Mo. App. 1991). In this particular case, White's claim is refuted by the record. The trial record reveals no oral or written instruction by the judge to the jury that in any earlier case, an attorney had lied to a jury. Thus, the pleadings and record conclusively show that relief was properly denied. Inasmuch as the motion court made extensive and specific findings and conclusions on every claim but one and the only claim upon which a necessary conclusion of law was omitted was a meritless allegation, reversal and remand are not warranted.

III.

In his appeal, White raises, for the first time, three claims not raised in his Rule 29.15 motions. All three fail.

A.

Judge Randall presided over White's first Rule 29.15 proceeding. In the first appeal, this Court remanded for a hearing to determine whether White had been abandoned by post-conviction counsel. Several days before the hearing, the judge had a conversation with the prosecuting attorney regarding the scope of the proceeding. White calls this conversation an improper ex parte communication, which gave rise to such an appearance of bias that the judge should have disqualified himself, sua sponte.

This argument is moot. The judge's determination that White had not been abandoned was overturned by this Court on White's second appeal. Attempting to revive this conversation as an issue, White notes that the judge's original rulings on the first amended Rule 29.15 motion are still before this Court. This is true, but that judgment was rendered on August 1, 1990, and the allegedly improper conversation occurred over one year later, in October or November of 1991. While we expect judges in this state to show foresight, it is a bit much to expect a judge to disqualify because of a conversation that is to occur more than one year in the future.

When the first motion judge made rulings relevant to the current appeal, no hint of bias existed. Therefore, he was under no duty to disqualify himself.

B.

Three weeks after the jury was discharged, the trial

judge held a hearing in chambers, where a juror testified that he thought he might have gone to high school with a man who sat in the courtroom during the trial. Apparently, this man was a family member of one of the victims. The juror testified that he had not associated the man with either side of the case and had not spoken with or acknowledged him during the trial.

Although White did not raise this issue in his direct appeal or assert it in his Rule 29.15 motion, he now asks this Court to conduct a plain error review. Plain error review may be considered "on appeal." *Rule 84.13 (c)*. This is not an appeal of White's conviction. Rather, this is an appeal of the post-conviction proceeding. Our standard of review here is whether the post-conviction court "clearly erred" in denying relief in the post-conviction proceeding. Since the issue was never raised in the post-conviction proceeding, error by that court, plain, clear or otherwise, is not discernible.

The only possible basis for considering the claim is under a claim of ineffective assistance of appellate counsel in the original appeal for failing to raise an issue which amounted to plain error. For purposes of discussion, we will assume that the issue is raised as a motion to recall the mandate.

In his brief, White asserts that if he had been present at the hearing, he "could have contributed to the outcome of the hearing, outlining for his attorneys the misconduct he had witnessed." However, the brief does not set forth that he actually observed any misconduct or that any misconduct actually occurred. White's absence from the hearing did not result in a manifest injustice or miscarriage of justice, and counsel's failure to raise such issue on appeal cannot be characterized as ineffective assistance of appellate counsel. This claim is denied.

C.

White finally contends that the time limits imposed by Rule 29.15 deprived him of his constitutional right to due process and resulted in arbitrary and capricious imposition of the death sentence, in violation of the constitutional prohibition against cruel and unusual punishment. White brings this claim for the first time on appeal, having failed to raise it in the motions for post-conviction relief as required by Rule 29.15 (d). This point is not reviewable. *See Twenter*, 818 S.W.2d at 641. Moreover, the time limits of Rule 29.15 are constitutional, even in death penalty cases. *See State v. Ervin*, 835 S.W.2d 905, 929 (Mo. banc 1992), *cert. denied*, 507 U.S. 954 (1993).

IV.

White's Rule 29.15 pleadings are fatally inadequate because he fails to allege facts, not conclusions, that, if true, would entitle him to relief or because his claims are refuted by the record. The reason for this holding is clear. The purpose of an evidentiary hearing is not to provide movant with an opportunity to produce facts not alleged in the motion. Rather, the purpose is to determine if the facts alleged in the motion are true. While the trial court erred in failing to enter a conclusion of law on one matter, remanding this case to supply the single missing legal conclusion would only serve to delay finality in this case and further burden the judicial system with a claim that is meritless.

The judgment of the trial court is affirmed.

JOHN C. HOLSTEIN, Chief Justice

Benton, Price, Limbaugh, Robertson, and Covington, JJ., concur; White, J., concurs in part and dissents in part in separate opinion filed.

SUPREME COURT OF MISSOURI
en banc

LEAMON WHITE,	)	**FILED**
	)	**FEB 25, 1997**
Appellant,	)	
	)	
vs.	)	**No. 78459**
	)	
STATE OF MISSOURI,	)	
	)	
Respondent.	)	

Opinion Concurring in Part and Dissenting in Part

Today the majority places important new burdens on those who seek an evidentiary hearing to prove their claims of ineffective assistance of counsel. While I differ with the majority's interpretation of the law on the specific points outlined below, my fundamental disagreement is with the majority's approach. The majority appears to see an evidentiary hearing as an unusual event, one that is justified only in the most compelling circumstances. I cannot find justification in our rules or precedents for this approach, and I disagree with the implicit policy choice that underlies it. I see little harm m giving a defendant, especially a death penalty defendant, one chance to present evidence that his counsel was ineffective.

Our rules encourage evidentiary hearings. An evidentiary hearing may only be denied when the record *conclusively* shows that the movant is not entitled to relief.[1] In the name of judicial economy and finality, the majority holds that the fact that a Rule 29.15 cannot be endlessly mended

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[1]Rule 29.15(g) (1988).

means that it is a specially disfavored pleading. But nowhere does the role suggest that the motion is to be read more narrowly than any other pleading. In fact, the opposite is true. Except for the limited time in which they may be amended, post-conviction relief motions are to be treated exactly like all other civil filings.[2] If Rule 29.15 motions are to be judged by a different standard, the fact that they can only be amended in a limited way suggests to me that they should be read more, not less, broadly than other types of pleadings. I share the majority's interest in the finality, legitimacy, and efficiency of judicial proceedings. But these goals are ill-served by a pleading regime that elevates the form of pleadings over their substance. As this case shows, endless arguments about procedure are just as harmful to swift sure justice as substantive attacks.

When the substantive claims seem especially compelling, an approach based on form rather than substantive merit is especially troublesome. In this case, the entire defense was founded on a theory of misidentification. Allegations that trial counsel did not do all they could to pursue evidence of misidentification has great power to undermine confidence in the outcome of the trial. In Section II.E. of its opinion, the majority disposes of these claims on the barest technicality: the use of the words "failed to adduce testimony" in the pleadings. The majority does not hold that Mr. White has not identified his counsel's alleged error with sufficient particularity to allow a judge to try the question, which is the purpose of the pleadings. Rather, the focus is on phrasing. As the majority highlights, Mr. White's first mended motion was hurriedly and carelessly prepared. It is not the most polished pleading. The motion misplaces commas, misspells the names of parties and writes "eyewitness" as "eye witness." Yet the majority sees the motion as a sophisticated exercise in "clever gamesmanship." From the

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[2]Rule 29.15(a) (1988).

history of this case, it appears that Mr. White's appointed counsel was more concerned about meeting the short deadlines he was faced with when the original post-conviction counsel abandoned Mr. White than he was about using the "subtle wording" of his motion in an attempt to "sandbag the State."

The majority's comparison to a game is inapt. This is not a contest where prisoners are trying to trick the courts into giving them frivolous hearings and the courts attempt to come up with clever ways to ensure that few hearings are held. Mr. White did not seek to build his case upon the pleadings found deficient today; he offered a thorough and professional second amended motion. But because a judge mistakenly allowed that motion to be filed out of time, Mr. White was not allowed to present his strongest claims in their best light. Instead, he was forced to proceed on motions that the Court now finds were facially inadequate.

This narrow reading of the pleadings extends to the issue of prejudice. Credibility of the eyewitness testimony is at the heart of this case. But the majority is more concerned with pleading formality than whether there is evidence to support Mr. White's claim that eyewitnesses disagreed about who was present in the house. Even if the motion properly alleged that eyewitnesses would place another man at the scene, the majority holds, no sufficient allegation of prejudice would have been made because Mr. White does not also plead that he was not one of the other people present. If this allegation were true, I cannot see how Mr. White could not have been prejudiced. The witnesses the State built their entire case around would have been contradicted, by other eyewitnesses, about the identity of the assailants. The proper pleading of prejudice does not require one to foreclose every logically possible response to an allegation. The trying and weighing of the evidence are what the hearing is for. Mr. White has properly placed his counsel's performance on the issue of witness identification into question.

He should be given a hearing to see if he has any evidence to support his claim.

I would also remand to require findings and conclusions on all issues raised in the motion. This Court has properly limited appellate review of post-conviction relief motions to a determination of whether the factual findings and legal conclusions of the motion court are clearly erroneous.[3] Since the review is so limited, this Court has, in the past, required findings and conclusions on all issues mised in the motion.[4] But today, the majority abandons this rule and denies, sua sponte, a claim upon which the State admits no findings or conclusions were made. The majority justifies this by citing the "common sense exception" *Barry* described. That no findings of fact need to be entered when there are no factual disputes is axiomatic. Where, as here and in *Barry,* there has been no evidentiary hearing, the issues are exclusively legal ones. *Barry* reiterated the Court's long standing rule that, in a judgment on a motion for post-conviction relief, "'a mere recital or statement that the motion, files and records conclusively show that movant is entitled to no relief'" is insufficient.[5] Had the motion court issued the bare conclusion that the motion, files, and records had showed that Mr. White was entitled to no relief on this issue, *Barry* would clearly be violated. I cannot see. how the total silence of the motion court can provide a better platform for meaningful appellate review than the conclusory rulings *Barry* explicitly forbids.

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[3]Rule 29.15(j) (1988).

[4]Rule 29.15(i) (1988); *Barry v. State*, 850 S.W.2d 348 (Mo. banc 1993).

[5]*Barry*, 850 S.W.2d at 350 (quoting *Fields v. State*, 572 S.W.2d 477, 483 (Mo. banc 1978), which referred to the "nearly identical provisions" of the previous rule governing post-conviction relief, Rule 27.26).

In many cases, the motion court's rulings are worse than conclusory, they are clearly erroneous. Again, this is most clearly shown in relation to the motion court's ruling on the issue of possible testimony that another perpetrator committed the crime. On that issue, the motion court found:

> 4. Movant's claim in I(E) of his First Amended Motion that his counsel failed to adduce testimony from Ben Kinney that he and Don Wright sold drugs for two black men by the names of A.J. and Jose because they had threatened to kill Ben Kinney. Counsel is under no obligation to use impeachment material that he knows is improper. Allegations of crimes which have not resulted in criminal convictions are not proper impeachment. See State v. Stephens, 672 S.W.2d 714 (Mo. 1984); State v. Coats, 668 S.W.2d 119 (Mo. App. 1984). Also, this line of cross examination would also not be proper because it is not proper to cross examine so as to show other persons had motive for crime [sic] without evidence Connecting other person [sic] to crime [sic]. State v. Easley, 662 S.W.2d 248 (Mo. banc 1983); State v. Wynn, 666 S.W.2d 862 (Mo. App. 1984).
>
> 5. As to movant's claim in I(F) in his First Amended Motion that his counsel should have adduced that his counsel should have adduced testimony from Deonat [sic] and Raymond Kinney that A.J. was the second perpetrator and not movant, is not a claim with merit because there is no showing of any affirmative evidence that A.J. was connected with this crime as mandated in State v. Easley.

Apparently, the crucially deceptive effect of the phrase "failed to adduce" was quite lost on the motion court. The court also did not find that the alleged failure to discover contradictory eyewitness testimony resulted in no prejudice. Instead, the motion court denied a hearing on the clearly erroneous theory that eyewitness testimony placing a different man at the crime scene would not have been allowable because there was no evidence that that man was connected with the crime. The majority does not attempt to defend this circular argument and, instead, substitutes its own legal conclusions for those of the trial court. The rule in *Barry* is that meaningful appellate review of Rule 29.15 motions is crucially dependent on the entry of legal conclusions by the motion court, even when it has had no opportunity to determine factual issues. Where the legal conclusions of the trial court depart so substantially from the law, appellate review is similarly frustrated.

As Judge Thomas eloquently wrote for a unanimous Court the last time this case was before us: "[D]eath penalty cases, often involving heinous crimes, have become clouded by arguments regarding verification and the filing of paper work. Missouri courts need to see through this blizzard of paper and technicalities that fog the underlying issues so they can reach a just and timely result, especially in death penalty cases."[6] This case has bounced back and forth between the trial court and this Court in order to answer entirely peripheral questions such as whether a fingerprint is sufficient to verify a petition and what the proper remedy is to correct a judge's mistaken grant of a filing extension. In that time, Lemon White has spent eight years on death row not getting what he deserves. Whether Mr. White deserves a new trial or a speedy execution depends upon a question that has remained completely unexplored: was Mr. White sentenced to die because he tortured and killed Don

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[6]*State v. White*, 873 S.W.2d 590, 594 (Mo. Banc 1994).

Wright or because his lawyers were more concerned about protecting themselves than their client? The only way we can get the certain answer we must have before we execute Mr. White is to give him a hearing.

I concur fully in Section III of the majority opinion. My reading of Mr. White's motion, however, convinces me that he adequately presents allegations that call into question the competence and zeal of his trial counsel. With respect, I must dissent from the denial of an evidentiary hearing.

RONNIE L. WHITE, Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LEAMON WHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 97-**
	)	**1663-CV-W-3**
	)	
MICHAEL S. BOWERSOX,	)	
	)	
Respondent.	)	

ORDER GRANTING CERTIFICATE OF APPEALABILITY IN PART AND DENYING CERTIFICATE OF APPEALABILITY IN PART

On this date, the Court has denied Petitioner's Petition for Writ of Habeas Corpus. In order to appeal to the Court of Appeals, Petitioner must first obtain a Certificate of Appealability. 28 U.S.C. § 2253(c)(2) provides that a Certificate of Appealability should be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." "[A] substantial showing that a federal right has been denied . . . requires a showing that the issues are debatable among reasonable jurists, a court could resolve the issues differently, or the issues deserve further proceedings." Fleiger v. Delo, 16 F.3d 878, 882-83 (8th Cir.), cert. denied, 513 U.S. 946 (1994).[32] The granting of a Certificate of Appealability is considered on an issue-by-issue basis. Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997).

As the Order denying Petitioners application demonstrates, the predominate issues in this case related to the

existence of, and Petitioners attempt to overcome, the procedural default of his claims in state court. The Court will (as specified below) deny a Certificate of Appealability with respect to the defaulted claims because there is no doubt that the claims were defaulted. Therefore, if the Court of Appeals reverses the rulings with respect to the procedural default, many of Petitioners defaulted claims would have to be reconsidered on remand.

After conducting an independent review of the matter, the Court concludes that a Certificate of Appealability should be granted with respect to the following issues, which will be identified by their heading from of the Order denying the writ:

II.A Procedural Default: Actual Innocence
II.B Procedural Default: Adequacy of State Grounds
III. Petitioners Entitlement to a Hearing
IV.F Ineffective Assistance of Appellate Counsel: Failure to Appeal Improper Removal of Juror for Cause
IV.L Trial Counsels Conflict of Interest
IV.O Due Process: Pleading Requirements
IV.AA Actual Innocence
IV.DD Judicial Bias During Postconviction Proceedings, Part I
IV.FF Judicial Bias During Postconviction Proceedings, Part II
IV.TT Conflict of Interest, Etc.

The Court concludes a Certificate of Appealability should be denied as to the remaining issues. When a Certificate of Appealability is denied, the court is required to "state the reasons why such a certificate should riot issue." Fed. R. App. P. 22(b); see also Tiedeman v. Benson, 122 F.3d 518, 522 (8th Cir. 1997). The rationale for the Courts ruling is as follows:

II.B Procedural Default: Ineffective Assistance of Postconviction Counsel, Part I - The Supreme Court and the Eighth Circuit have repeatedly held there is no right to effective assistance of postconviction counsel.

II.C Procedural Default: Abandonment of Postconviction Counsel - The Supreme Court and the Eighth Circuit have repeatedly held the Sixth Amendment does not apply in a postconviction proceeding.

IV.A Ineffective Assistance of Trial Counsel: Voir Dire, Part I - The claim has been procedurally defaulted.

IV.B Informing Jurors About the Governors Power to Pardon - The claim was implicitly rejected by the Supreme Court in Ramos and explicitly rejected by the Eighth Circuit in Bannister.

IV.C Ineffective Assistance of Trial Counsel: Failure to Raise *Caldwell* Objection - This claim was procedurally defaulted. In addition, the objection had no merit, so Petitioner could not have suffered prejudice.

IV. D Ineffective Assistance of Trial Counsel: Failure to Request Removal of Juror - This claim was procedurally defaulted.

IV.E Right to Fair and Impartial Jury - This claim was procedurally defaulted.

IV.G Ineffective Assistance of Trial Counsel: Failure to Object to Removal of Juror - This claim was procedurally defaulted. In addition, the record conclusively contradicts the factual basis for Petitioners claim.

IV.H Ineffective Assistance of Trial Counsel: Voir Dire, Part II - This claim was procedurally defaulted.

IV.I Ineffective Assistance of Trial Counsel: Failure to Investigate and Introduce Evidence of Innocence - This claim was procedurally defaulted.

IV.J Ineffective Assistance of Trial Counsel: Failure to Present Mitigating Evidence - This claim was procedurally defaulted.

IV.K Eighth Amendment Violation: Lack of Mitigating Evidence - This claim was procedurally defaulted. In addition, relief would require a new rule of Constitutional law in violation of Teague v. Lane.

IV.M Ineffectiveness of Appellate Counsel: Myriad of Claims - These claims all related to the failure to appeal specified claims of ineffective assistance of appellate counsel, which is not cognizable.

IV.N Due Process Violation: Abandonment by Postconviction Counsel - Case law firmly establishes that there is no right to counsel in a postconviction proceeding. Petitioners attempt to base his claim on the Fourteenth Amendment instead of the Sixth Amendment would require a new rule of Constitutional law in violation of Teague v. Lane.

IV.P Due Process: Rule 29.15ÿs Deadlines - The Eighth Circuit has already rejected this argument several times.

IV.Q Ineffective Assistance of Trial Counsel: Failure to Interview Joyce Williams - This claim was procedurally defaulted. In addition, Williams affidavit demonstrates that trial counsel did interview her.

IV.R Ineffective Assistance of Trial Counsel: Failure to Give an Opening Statement at the Beginning of Trial - This claim was

procedurally defaulted. In addition, the decision to deliver an opening statement at the beginning of the defendants case instead of the beginning of trial is a classic strategic decision that cannot be second-guessed.

IV.S Ineffective Assistance of Trial Counsel: Failure to Hire an Expert - This claim was procedurally defaulted.

IV.T Ineffective Assistance of Trial Counsel: Failure to Object to Instructions on Aggravating Circumstances - This claim was procedurally defaulted. In addition, Petitioner was not prejudiced because Missouri has a "nonweighing" capital sentencing scheme.

IV.U Ineffective Assistance of Trial Counsel: Failure to Object to Videotaped Lineup - This claim was procedurally defaulted. In addition, Petitioner was not prejudiced because the claim had no merit.

IV.V Ineffective Assistance of Trial Counsel: Failure to Impeach Detective Gibson - This claim was procedurally defaulted.

IV.W Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor Use of Peremptory Challenges and Certain Strikes for Cause - This claim was procedurally defaulted. In addition, Petitioners attempt to apply Batson v. Kentucky to the prosecutor use of peremptories to eliminate prospective jurors with marginal doubts about the death penalty is really a new rule that would be barred by Teague v. Lane.

IV.X Ineffective Assistance of Trial Counsel: Failure to Object to Prosecutor Closing Argument During Penalty Phase - This claim was procedurally defaulted.

IV.Y Ineffective Assistance of Appellate Counsel: Failure to Appeal Introduction of Evidence Regarding *Miranda* Waiver - Trial counsel did not make a constitutional objection, and Appellate Counsels decision not to appeal for plain error is hard to second-guess. In addition, the evidence does not constitute a comment on Petitioners decision not to testify at trial.

IV.Z Ineffective Assistance of Appellate Counsel: Failure to Appeal Ernest Blacks In-Court Identification of Petitioner - This claim would have been reviewed only for plain error. In addition, the factual basis for Petitioners claim is not supported by the record.

IV.BB Ineffective Assistance of Trial Counsel: Failure to Discuss Plea Offer - This claim was procedurally defaulted.

IV.CC Ineffective Assistance of Trial Counsel: Absence of Lead Trial Counsel - This claim was procedurally defaulted.

IV.EE Judicial Bias During Trial - This claim was procedurally defaulted.

IV.GG Ineffective Assistance of Trial Counsel: "Bad Loser" Comment - This claim was procedurally defaulted. In addition, as discussed in detail in the Order denying relief, the record demonstrates that Petitioner suffered no prejudice as a result of this comment.

IV.HH Ineffective Assistance of Postconviction Counsel, Part II - This claim is not cognizable.

IV.II Ineffective Assistance of Appellate Counsel: Failure to Raise Enumerated Claims - This claim actually consists of other claims raised independently elsewhere in the Petition. It is not an independent claim, and the issues it

raises are discussed elsewhere.

IV.SS Ineffective Assistance of Trial Counsel: Myriad of Claims - These claims were procedurally defaulted and, in any event, have no merit.

IV.UU Restriction on Cross Examination of Kinney - This claim involves issues of s law and is not cognizable in a habeas proceeding.

IV.VV Cumulative Error of Trial Counsel - The Eighth Circuit has repeatedly held this claim is not cognizable.

IV.WW Cumulative Error (Generally) - The Eighth Circuit has repeatedly held this claim is not cognizable.

IT IS SO ORDERED.

/s/_____
ORTRIE O. SMITH, JUDGE
DATE 12/4/98
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

LEAMON WHITE,
Petitioner,
vs. **No. 97-1663-CV-W-ODS**
AL LUEBBERS,
Respondent.

VIDEOTAPED DEPOSITION OF DOROTHY B. MERRELL, a Witness, taken on behalf of the Petitioner before Glenda Moeller, CSR, RMR, CRR, pursuant to Notice on the 28th day of July, 2003, at the offices of Fox, Partee & Nigro, 606 West 39th Street, Kansas City, Missouri.

APPEARANCES

Appearing for the Petitioner were Mr. Charles W. Gordon, Jr. of Hubbell Peak O'Neal Napier & Leach, 30 West Pershing Road, Suite 350, Kansas City, Missouri 64108 and Mr. Ronald E. Partee of Fox, Partee & Nigro, 606 West 39th Street, Kansas City, Missouri 64111.

Appearing for the Respondent was Mr. Stephen D. Hawke, Assistant Attorney General, State of Missouri Attorney General's Office, Supreme Court Building, P.O. Box 899, Jefferson City, Missouri 65102.

Also present was Mr. Brent Christopher of Christopher Video.

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(Exhibits retained by Mr. Gordon.)

THE VIDEOGRAPHER: Today's date is July 28th, 2003. The time is 9:28 a.m. This is the deposition of Dorothy Merrell. Would you please swear the witness.

DOROTHY B. MERRELL,
a Witness, being first duly sworn, testified under oath as follows:

EXAMINATION BY MR. GORDON:

Q. Ms. Merrell would you tell us your full name, please?

A. Dorothy B. Merrell.

Q. And where do you live?

A. Atlanta, Georgia.

Q. How old are you?

A. Sixty-two.

Q. How long have you lived in Atlanta, Georgia?

A. Since '97.

Q. There was a time when you lived in Kansas City; is that right?

A. Correct.

Q. When was the last time that you lived in Kansas City?

A. Oh, my God. I left in - - no, no, no. Not in '97. I left Missouri right after this incident, I believe.
Q. So around 1987?

A. Something like that.

Q. Do you remember - - th incident you're talking about is the killing of Don Wright and the attack - -

A. Correct.

Q. - - on Carol and Ernest Black?

A. That's correct.

Q. And so you left town shortly after that?

A. Uh-huh.

Q. Today when you answer you need to give an out loud response - -

A. Oh, okay. Sorry.

Q. - - so they have it on the - -

A. Sorry about that.

Q. - - so she can write it down.

A. Okay.

Q. When you lived in Kansas City, where was it that you lived?

A. 45th and Brooklyn.

Q. And who lived in that house with you at 45th and Brooklyn?

A. Gwen, my two grandchildren, and Ben Kinney.

Q. Gwen is your daughter; is that right?

A. Yes.

Q. And we heard from her earlier this morning.

A. Yes.

Q. And Ben was her boyfriend; is that right?

A. Yes.

Q. And they lived together?

A. There in the house with me, yes.

Q. And your two grandchildren, what were their names?

A. Rodney and Jasmine. Rodney Louis and Jasmine Kinney.

Q. And they're pretty much grown up now; right?

A. Yes, correct.

Q. Did you know a lady named Carol Kinney at the time?

A. Nicki.

Q. She went by the - -

A. Yes.

Q. - - nickname Nicki?

A. Yes. Uh-huh, In didn't know her first name, but that's her, Nicki.

Q. And you knew her then as Nicki Kinney?

A. That's right.

Q. And Nicki Kinney, was she the sister of Ben Kinney?

A. Correct.

Q. And did she come around the house at 45th and Brooklyn?

A. Yes.

Q. Do you know a man named Don Wright?

A. Yes.

Q. And how did you know Don Wright?

A. Through Nicki. He was - - also showed up around my house.

Q. Did Don Wright have a relationship with Nicki at that time?

A. Yes.

Q. And did they live together somewhere?

A. As far as I know they did.

Q. Did they live very far from you at 55th and Brooklyn at that point?

A. About two blocks from me.

Q. Now, this house at 45th and Brooklyn, we understand that drugs were being sold out of that house at various times; is that right?

A. Yes.

Q. Can you tell me a little bit about that?

A. Well, I sold drugs when In was living there for Josh. I don't know his last name. I - -

Q. And who was Josh?

A. Another Jamaican.

Q. And how did that come about that you ended up having to sell drugs for Josh, that Jamaican?

A. Ben Kinney had messed up some drugs of his. And at the time Ben was dating my daughter Gwen. Josh was going to kill

them, kill my daughter. And in order for me to keep him from killing my daughter, he told me In had to sell drugs to keep my daughter alive. That's how In got started dealing with drugs. And when I wanted to get out, he would hold that over my head.

Q. So you felt pressured to sell the drugs?

A. Yes.

Q. And the drugs that you were selling, what kind of drugs were those?

A. Rocks. That's what we called them then, rocks. Cocaine rocks.

Q. And is another name for that crack cocaine? Rocks?

A. Rocks, that's all.

Q. How did people do the rocks? How did they use it?

A. Use it?

Q. Yes.

A. You could use it by smoking it on a can, but at the time they were using things called straight shooter and a pipe.

Q. Did people do drugs at the house, at your house, 45th and Brooklyn, when they would come over there and smoke crack?

A. Yes.

Q. And would people be coming in and out doing that?

A. Coming in and out to smoke, you mean?

Q. Yes.

A. They would come in and buy the drugs and stay in and smoke.

Q. When Ben was selling drugs at the house at 45th and Brooklyn, did he have different suppliers other than Josh?

A. Yes.

Q. Tell me a little bit about that.

A. Well, Ben dealt with different persons. He dealt with Jay and anybody that Jay would deal with. Jay usually - - at the time when I was with Josh, he was with Josh too. And after Jay left Josh, then I don't know did Ben get any more drugs from Jay or not. So, yeah, he was dealing with different connections.

Q. There was a man that you knew as Jay; is that right?

A. Yes.

Q. Did other people call him something else?

A. A.J.

Q. But when you talked to him, you called him Jay; is that right?

A. I used Jay because I was always scared of him. Jay was very dangerous.

Q. Why do you say that? Why do you say he was very dangerous?

A. Because when he would come to the house one time to buy

some drugs for Josh, and Ben was a big smoker, and Ben had used his drugs and he threatened to kill Ben if he didn't get them drugs up, or his money. So I had to get Ben the money to keep Jay from killing him.

Q. So you had seen Jay threaten Ben before?

A. Yes.

Q. And that made you - -

A. Because I was already into enough pressure with my daughter trying to keep Josh from killing her. Then I didn't want Jay to have to kill my granddaughter's dad, so I give him the money to keep him off of Ben.

Q. So you felt pressure from both Josh and from Jay?

A. Correct.

Q. And Jay was also known by A.J.?

A. Correct.

Q. I'm going to hand you a picture that we've marked in the previous depositions as G. Merrell Deposition Exhibit No. 1. Can you identify the person in that photograph?

A. Yes. Those eyes.

Q. Who is that?

A. Jay.

Q. Let me hand you another photograph. This has been marked G. Merrell Deposition Exhibit No. 2. Do you recognize that as

the same man?

A. Yes.

Q. And that is the man that you called Jay?

A. That's correct.

Q. And that's the man that other people called A.J.?

A. Correct.

Q. Do you know what his nationality was? Was he from around here? Was he American?

A. No.

Q. Was he foreign?

A. He's Jamaica.

Q. I want to ask you now about events that took place on January 5th and January 6th of 1987. You remember the morning of the attack where Don Wright was killed and Carol, Nicki, was injured and Ernest Black was injured?

A. Yes.

Q. And you understand - -

A. I know what happened, yes.

Q. And you understand that happened January 6th of 1987?

A. Yes.

Q. And those people, Don Wright, Carol Kinney and Ernest Black had been at your house before they were attacked; is that right?

A. Yes.

Q. Do you remember Don Wright and Carol Kinney that ev - - that morning and night before and talking with them and them being at the house?

A. Yes.

Q. Do you remember around what time they arrived at your house and what time they left your house?

A. Oh, the night that they was attacked?

Q. Yes.

A. They was practically there all day.

Q. Do you remember when they left the morning of January 6th?

A. They left early in the morning.

Q. Was it - - it was definitely after midnight on January 6th?

A. Oh, yes.

Q. Was it after 1 or 2 in the morning?

A. It was between maybe 2:30 something, 3 maybe, a little earlier, I don't remember. But it was early in the morning.

Q. And what were - - and I'll call her Nicki - - Micki because

you call her Micki, so I don't confuse you.

What were Micki and Don Wright doing that morning and the night before at your house at 45 th and Brooklyn?

A. Smoking.

Q. And what was it they were smoking?

A. Crack cocaine.

Q. And that's what you've called rock?

A. Yes.

Q. And how much smoking were they doing?

A. A lot.

Q. Do you remember Roger Buckner and A.J. - -

A. Yes.

Q. - - coming to the house that evening and that morning?

A. Yes.

Q. Tell me about that.

A. They came in there that morning. It was A.J. and Roger, he was wearing the Jheri-curl - -

Q. Let me ask you a little bit about Roger. I don't think I've asked you about him yet. You knew this guy named Roger Buckner; is that right?

A. Yes.

Q. And was he a friend of Ben Kinney?

A. Yes.

Q. And tell me about his hair. What kind of hair did he have?

A. He was wearing a long Jheri-curl. A Jheri-curl is what we call - - it was like a curl but we roll some kind of curl cream on it which make it real oily.

Q. So it's a pretty obvious different looking haircut?

A. Yes.

Q. And you knew Roger Buckner at that time to have this Jheri-curl haircut?

A. Yes.

Q. And he was at the house was it the morning of January 6th or the night before, the night of January 5th?

A. He was there before and the day that they was attacked.

Q. And what was he doing at the house?

A. When they first came there, they came to really kill us.

Q. When you say "they," was somebody with Roger?

A. When Roger came, he was with Jay.

Q. And Jay is the man you've identified in these photographs?

A. Yes. And they came really to kill us, because they known that we sold drugs. So Roger told Ben that he was there to kill us, but Ben didn't believe him at first because they grew up right close with one another in the neighborhood. So then they kept asking Ben did we have drugs, and Ben finally convinced them that we really didn't have drugs at the time, we were waiting on drugs. But I didn't have any drugs in the house. So that's why he didn't kill us. So Don and Nicki was there at the time that they was there.

Q. Now, Don and Nicki - - Don and Micki were there at the house when A.J. and Roger were at your house?

A. Correct.

Q. And this is the house at 45th and Brooklyn?

A. Correct.

Q. And did Don and Micki, did they know anything about Roger wanting to kill Bam and you and Gwen at the house?

A. Well, Ben told Micki that Roger would say - - Ben, he didn't really believe it, so he told his sister about Roger said that he come there to kill us if we had some drugs.

Q. Did he tell her that that night or was it - -

A. The same night. But then they didn't believe it. But I figured - - but he was with him. I never did like him, his eyes and his ways. I always was kind of scared of him.

Q. When Ben talked about Roger wanting to kill him and he didn't believe it, is that because they had a friendship that existed?

A. Who, Roger and Ben?

Q. Roger and Ben.

A. Yes.

Q. Did they go back a long ways?

A. Yes.

Q. What was Don Wright doing while A.J. and Roger Buckner was at the house?

A. Well, Ben and Roger and A.J. was talking, Nicki and Don was sitting at the table with me. So Don was bragging after he found out we didn't have any drugs and that Roger and Jay was wanting drugs. He always was a big bragger, Don was.

Q. Tell me about that. What do you mean - -

A. Don wanted to be we would call it a big shot, the man like Josh was. He wanted to be the mane that always had what everybody had and he didn't have. He was bragging about he had all kinds of drugs at his house.

Q. Did he say that so that Roger and A.J. could hear him?

A. Yes.

Q. Did he say - -

A. Because he wanted them to get - - he was the type that if I don't have, I got it, I'm big time, come to me, come to my house and you can get it. So he was saying that he had the drugs that they using, they could come out, pick up the drugs there. And so - -

Q. Did he really have drugs?

A. No. he never did have drugs. He always would agitate that th was big time sales drug. He was a big user, so he couldn't sell drugs. But he wanted to be - - like tell people that he would have drugs, I got drugs, come by here and get them.

Q. He kind of looked up to the drug dealers?

A. Yes.

Q. And he wanted to be a part of that culture?

A. Yes, but he didn't ever sell drugs.

Q. And was he a heavy user? How would you describe that?

A. He was a big smoker too, yeah.

Q. When Don was bragging in front of A.J. and Roger about having drugs, did Carol Kinney have any reaction? Micki, did she have a reaction?

A. Yes, she did.

Q. What was her reaction?

A. She told him that he was going to get them killed. Say you always lying and bragging about you have a lot of drugs and you know you don't have drugs. She said one day you're going to get us killed.

Q. So she was indicating she was concerned about his bragging?

A. She always did. At the time we was selling drugs, people

would kill you about anything about drugs. If you don't have them they'll kill you. Like Don, Don bragged that he had drugs, and if a person went there to get drugs and if you don't have them, they'll kill you, because that's what they were looking for, them drugs that you was supposed to have, and then you're lying to them. And especially when you shoot up like they were doing, they wanted them drugs and smoked that stuff, and them people will kill you because that what you say, you had the drugs. And Don never sold drugs.

Q. Did Don, that morning at your house, January 6th, that morning, make some arrangements with Roger to do a drug transaction, Roger and A.J.?

A. He told them that he had the drugs and they could come by and pick up the drugs.

Q. Who did he tell that to?

A. Jay was standing up there, and Roger, was talking to Roger.

Q. And did Don Wright make arrangements with Roger and Jay to have them come over to his house?

A. Yes, they was supposed to - - when they went home, they supposed to went up and picked the drugs - - got the drugs. But Nicki was kind of scared with him.

Q. Where were Jay and Roger supposed to go?

A. Up on - - they were about 45th and Prospect, up on Prospect.

Q. Is that the house that - - the house you're thinking of, is that the house where Don and Micki lived together?

A. Yes.

Q. So Don Wright had made an arrangement with Roger and Jay for them to come to his house?

A. Yes.

Q. And the idea was they were going to buy drugs from him?

A. Yes.

Q. And you said that Micki was scared about that.

A. Yes.

Q. How did she indicate that?

A. She always was on him about bragging about he had drugs. And with her two boys, she always was kind of scared that somebody was going to come in and kill them because of him bragging and he didn't have drugs.

Q. Did Don Wright and Micki leave the house at some point that morning?

A. Yes.

Q. Do you remember what time that was about?

A. About 20 minutes after Don had made arrangement for them to pick up the drugs, they left.

Q. Did Roger and Jay stay at your house longer?

A. Yes.

Q. And what were they doing when they stayed at the house longer?

A. They was sitting around there talking.

Q. What were they talking about, do you know?

A. They were mostly talking with Ben, talking drug talk.

Q. Talking drug talk?

A. Yes.

Q. And how much longer did Jay and Roger stay at the house?

A. They stayed there abut 5 to 10 minutes.

Q. And then they left the house?

A. Right after Don and Nick left, about 5 or 10 minutes later Roger looked at Jay and said, "Let's go get the drugs."

Q. And the man with Roger that night, there's no doubt in your mind, was the man shown in G. Merrell Deposition Exhibit No. 1?

A. Correct.

Q. And that's Jay?

A. Yes.

Q. I want to show you now what's been marked as G. Merrell Deposition Exhibit No. 3. That man is Leamon White. Had you even seen Leamon White at your house?

A. No.

Q. Other than in this photograph and the photograph we've marked as G. Merrell Deposition Exhibit No. 4, had you ever seen Leamon White?

A. No, I never heard of him or his name until I seen that guy came to Atlanta.

Q. And the guy that came to Atlanta you're talking about his Dan Grothaus; is that right?

A. Yes.

Q. And he's the one that took that affidavit from you several years ago; is that correct?

A. Correct.

(D. Merrell Deposition Exhibit 1 was marked for identification.)

Q. (By Mr. Gordon) I'm going to hand you what's been marked D. Merrell Deposition Exhibit No. 1. Do you recognize that as the affidavit you have to Don Grothaus?

A. Yes.

Q. And your signature is on page 2; is that right?

A. Correct.

Q. And then there was some photographs that were attached that you signed to the affidavit. Do you see that?

A. Yes.

Q. And that's your signature under the photograph that says Exhibit A?

A. Yes.

Q. And that is a photocopy of this photograph of A.J. that you've identified as G. Merrell Deposition Exhibit No. 2?

A. Yes.

Q. And then there was a photograph that was marked as Exhibit B, the last page of that affidavit. Do you see that?

A. Yes.

Q. And that is a photocopy of the photograph that you've identified as G. Merrell Deposition Exhibit No. 4.

A. Uh-huh, yes.

Q. And Leamon White was never over at your house on 45th and Brooklyn?

A. As long as I was at 45th and Prospect - - Brooklyn, when I was dealing drugs, I never did see this Leamon White. I never heard of him. As far as I know, he never been in my house. And I always kind of - - I had to fix it so I would know who would come in and out there.

Q. So you knew the people coming in and out of your house?

A. Very much so.

Q. And you're positive, as you sit here today, that Leamon White was never in your house?

A. He was never at my house. Never. No time before then, that night.

Q. And you're positive as you sit here today that Jay was at your house?

A. Yes.

Q. And that Jay was at your house with Roger Buckner?

A. Yes.

Q. And Jay was at your house with Roger Buckner on the morning of January 6th, 1987?

A. Yes.

MR. GORDON: Thank you, Ms. Merrell, those are my questions.

EXAMINATION BY MR. HAWKE:

Q. Just a few questions from me this morning. On January 6th of 1987, who was in your house?

A. You mean how many all of us that was in there?

Q. Yes. Identify those people for us.

A. Don, Nicki- -you mean you want me to include A.J. and - -

Q. Yes, ma'am.

A. Jay, Roger, Ben Kinney, Gwen. That's as far as I can remember who was there.

Q. And I believe I heard you say that Don was not a seller of drugs?

A. As far as I know, he never sold drugs.

Q. And what do you mean when you say he is not a seller? He did not have a house, a crack house?

A. No, he did not have one.

Q. Okay. And to your knowledge, he was not a seller of drugs?

A. Correct.

MR. HAWKE: Okay, that's all.

MR. GORDON: All right, Ron, do you have anything?

MR. PARTEE: No.

MR. GORDON: Okay, we're finished.

THE VIDEOGRAPHER: We're going off the record at 9:50 a.m.

Supreme Court, U.S.
4 FILED

05-686 NOV 21 2005

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

APPENDIX TO PETITION
VOL. 3 OF 3

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TESTIMONY OF DEONTA KINNEY AT TRIAL OF ROGER BUCKNER

MR. BERRIGAN: The defense will call Deonte Kinney to the stand, Your Honor.

DEONTE KINNEY, called as a witness on behalf of the Defendant, being first duly sworn by the Court, testified:

DIRECT EXAMINATION BY MR. BERRIGAN:

Q. Would you state your name please, Deonte?

A. What do you mean?

Q. Tell me your name.

A. Deonte Kinney.

Q. How old are you, Deonte?

A. Eleven.

Q. Do you go to school?

A. Yes.

Q. What grade are you in?

A. 5th.

Q. Can you read and write?

A. Yes.

Q. All right. Do you understand the difference between telling

the truth and telling a lie, Deonte?

A. Yes.

Q. You have done this before. You have testified under oath, told us what happened about this case, haven't you?

A. Yes.

Q. Do you remember back in March when - - actually it wasn't March, September, when you came up to the tenth floor of this building and you talked to Mr. Hall and Barbara and I about the case?

A. Yes.

Q. All right. Now you are in court today and I'm going to ask you some questions about what took place the evening that your mom got stabbed in the neck, okay. First of all, do you remember what you did that day, that is the day before your mom got stabbed?

A. No.

Q. Do you remember if you went to school or not?

A. I went to school.

Q. Okay. What did you do after school?

A. Went back home that day. But not the day my mom got stabbed.

Q. I'm just going to talk about the day that your mom got stabbed. What did you do after school that day?

A. Went over to my uncle's.

Q What's his name?

A. Bam.

Q. Bam. Does he have a real name?

A. Yes.

Q. What is it?

A. Benjamin.

Q. What's his last name?

A. Kinney.

Q. Where did he live back then?

A. Somewhere over there on Olive.

Q. Was that on 44th Street near Olive?

A. Yes.

Q. Is it near a park?

A. Yes.

Q. How did you get over to Uncle Bam's house from school?

A. Walked.

Q. Did you go right after school?

A. Yes.

Q. What time do you get out of school.

A. 3:30.

Q. And why were you going over to Uncle Bam's?

A. Because my mom had to go to work and there wasn't nobody home.

Q. Did you used to go to Uncle Bam's a lot back then?

A. No.

Q. So this was a special time?

A. Right.

Q. Who went over to Uncle Bam's with you?

A. My brother.

Q. Okay. And do you know when you got over to Uncle Bam's, who was there?

A. Yes.

Q. Who was there?

A. Bam and two other guys.

Q. Who were these two other guys?

A. I don't know their name.

Q. What were they doing at Bam's?

A. Playing cards.

Q. Was there anybody else there at Bam's?

A. No.

Q. Do you know Bam's girlfriend?

A. Yes.

Q. What's her name?

A. Gwen.

Q. Was she over there?

A. No.

Q. What about Gwen's mom, do you know her?

A. Yes.

Q. Dorothy?

A. Yes.

Q. Do you remember seeing her there?

A. No.

Q. The only people you remember were Bam and these two friends of his playing cards, huh?

A. Yes.

Q. What did you do after you got to Bam's house?

A. Me and my brother and Bam's son went up to the park.

Q. What is Bam's son's name?

A. Rodney.

Q. Rodney. All right. And when you and Rodney and your brother went to the park to play, did you come back to Bam's house?

A. Yes.

Q. Do you know what time it was when you came back?

A. No.

Q. Was it still dark or was it - - I mean was it dark or was it still light?

A. Still light.

Q. When you came back to Bam's house now, after being in the park, what did you do?

A. Went in and got a drink of water.

Q. Did you see these other men still there?

A. Yes.

Q. What were they doing now?

A. Arguing over who's winning or not.

Q. Who's winning what?

A. Cards.

Q. Cards. Was there anybody else there other than Bam and the two men?

A. No.

Q. Now, after you got this drink of water, what did you do?

A. Went back up to the park.

Q. Okay. You played some more?

A. Yes.

Q. All right. Did you come back to Uncle Bam's house then?

A. Yes.

Q. And now when you came back to Uncle Bam's this second time, was it light or dark outside?

A. Sort of dark.

Q. The sun was going down?

A. Yes.

Q. Now, what did you do when you came back to Uncle Bam's the second time when the sun was going down?

A. Went in and stayed in.

Q. I'm sorry?

A. Went in and didn't come back out.

Q. You stayed in Uncle Bam's for quite awhile after that?

A. Right.

Q. What did you do at Uncle Bam's house?

A. Had a sandwich and I sat down and watched TV.

Q. Did you see any other people there this time, Deonte?

A. Gwen came back over.

Q. All right. Anybody else?

A. No.

Q. Was your mom there then?

A. No.

Q. When did she get there, or did your mom ever come over to Bam's?

A. No, she didn't ever come back over.

Q. You don't remember her coming over?

A. No.

Q. Was there anybody else with Bam other than these two men that you have told me about?

A. No.

Q. Were they doing anything other than playing cards?

A. Yes.

Q. What else were they doing?

A. Selling crack.

Q. All right. Now, how do you know they were selling crack?

A. Because you can see the sack and all that crack and all the cocaine, powder and all that.

Q. You know what crack looks like?

A. Yes.

Q. What's it look like?

A. Yellow little chipped piece of - - almost look like a rock.

Q. And when the crack is sold, is it put in some kind of a bag?

A. Yes.

Q. What's that look like?

A. It's a little see-through bag with red across the top.

Q. A little plastic bag?

A. Right.

Q. I am going to show you a bag that I'm taking out of State's Exhibit No. 88. Do you see that little bag there?

A. Yes.

Q. Is that the kind of bag that crack goes in?

A. Yes.

Q. All right. So how much of this crack did you see over there at Bam's house?

A. A whole bag full.

Q. A bag full of it?

A. Yes.

Q. Did you see people coming to and from the house to buy this crack?

A. Yes.

Q. And you say your Uncle Bam was selling it, too, huh?

A. Yes.

Q. What about these other two men, what were they doing?

A. One - - one, the fat chubby one, was laying down asleep, and while the other one and Bam were - - one was making - - making it and the other was giving it.

Q. Giving it out to people?

A. Right.

Q. They paid money for it, didn't they?

A. They made it.

Q. Did you see any money when these people came to buy the crack?

A. Yes.

Q. What happened to the money?

A. Bam took it and gave them the crack and stuff.

Q. This fat chubby fellow that was with Bam, do you know him?

A. Bam told me his name.

Q. What was his name?

A. A.J.

Q. A.J. Had you ever seen him before?

A. No.

Q. That was the first time you saw him?

A. Yes.

Q. All right. Now, you told me that you first saw these fellows when you came over to the house right after school, is that right?

A. Right.

Q. Did at any time either one of those fellows that was with Bam, did they leave the house?

A. No.

Q. They were there until after you left, huh?

A. They left before I - - before I left.

Q. Okay, that's what I mean. You saw these two fellows leave that were selling drugs with Bam?

A. Yes.

Q. Do you know where they went?

A. No.

Q. Now, did you see anybody else at Bam's house other than these two fellows, A.J. and the other guy and Gwen and Bam?

A. No.

Q. What did you do after you came back that second time and you stayed at Bam's house for the rest of the evening, what were you doing there?

A. We went - - me, my brother and Rodney went into the playroom.

Q. The play room?

A. Right.

Q. Where were these men selling drugs from?

A. The living room.

Q. The living room of the house. Did you go in there and

actually see these men?

A. Yes.

Q. Did you get a good look at them?

A. No.

Q. No. How do you know that this was A.J.?

A. Because the guy that had natural hair went over to wake him up, he was calling him his name.

Q. He kept calling his name?

A. Yes.

Q. You said Bam called him A.J., too?

A. When he left.

Q. So two people were calling this chubby man A.J.?

A. Yes.

Q. Now, this guy with the natural hairdo, he is the other man that you are talking about that was selling drugs with Bam and A.J.?

A. Yes.

Q. Had you ever seen him before?

A. No.

Q. Do you know his name?

A. No.

Q. Did you go home that night from your Uncle Bam's house?

A. Yes.

Q. How did you get home, do you remember; walking or getting a ride?

A. Walking.

Q. Who walked with you?

A. Bam and my bother and that's it.

Q. And what happened then once you got home?

A. My brother did his homework. He was about to go in there to watch TV but he got in the bed, and I was already in it.

Q. You were already in bed?

A. Right.

Q. Did you go straight to bed when you got home?

A. Yes.

Q. Did you see anybody over at your house?

A. Yes.

Q. Who was over there?

A. My mom, Don and a guy with black.

Q. With what?

A. With black, a black suit on.

Q. Okay. Had you ever seen him before?

A. No.

Q. What were they doing over at the house?

A. Playing cards and smoking cigarettes.

Q. Smoking cigarettes?

A. Yes.

Q. Are you sure they weren't smoking cocaine?

A. Yes, I'm sure.

Q. And it was just the three of them there then?

A. Yes.

Q. Now, did you go to sleep?

A. Yes.

Q. And did you later wake up?

A. Yes.

Q. When you woke up, what caused you to wake up?

A. My brother.

Q. What did your brother do that made you wake up?

A. Pushed me out of the bed.

Q. He pushed out of the bed?

A. Yes.

Q. What for?

A. Because he - - somebody made a - - the door made a loud slam and he woke up and pushed me out of the bed to wake me up.

Q. And what happened then after your brother woke you up?

A. I got back in the bed and laid down because I seen a guy go into the bathroom and then he came out and all I heard is someone fall to the ground.

Q. Now, this guy that went in the bathroom, had you ever seen him before?

A. No, I don't think.

Q. You say you heard somebody fall down?

A. Yes.

Q. Were you able to see who that was?

A. No.

Q. Did you hear anything else, other than this person falling down?

A. No.

Q. What did you do then, after this - - you heard this person fall down?

A. Stayed still.

Q. How come?

A. Because - - because if I would have got up to look, I was afraid they might come in there and do something to me.

Q. You were afraid that who was going to come in?

A. All of them, all three of them.

Q. Well, did you see somebody other than the man that you saw go in the bathroom?

A. No.

Q. Okay. Not yet, huh?

A. Right.

Q. He is the only one that you saw so far, is that right?

A. Yes.

Q. Did you later see some other men, other than the man that you saw go in the bathroom?

A. Yes.

Q. All right. These other two men, what did they look like?

A. One was fat, chubby, had on yellow and black gloves with a black jacket, and one I think had natural hair, had on a burgundy jacket and had on gloves and had on jeans.

Q. Now, these two men, Deonte, that you have just described, had you seen those men before?

A. Those two.

Q. Where did you see them before?

A. Bam's.

Q. When did you see them at Bam's?

A. When we came home - - when we came over there after school.

Q. The same night?

A. Yes.

Q. These are the two same men that you had just seen playing cards and dealing drugs at Bam's house?

A. Yes.

Q. Now, what did these three men do?

A. What do you mean?

Q. Did you see what they did after they came in your house?

A. No.

Q. What did you do?

A. After my brother pushed me out of the bed, I was about to go look to see who it was but my brother told me to get back into bed, so I did.

Q. And you told me you were scared, too, is that right?

A. Yes.

Q. You told me about the man that you saw going into the bathroom. Where did you see thee other two men, the fat chubby man and the man with the natural hairdo?

A. They were standing by the door.

Q. By what door?

A. The one by the bathroom.

Q. The one near the bathroom?

A. Yes.

Q. All right. I am going to show you a picture, actually it's a diagram of your house. This is State' s Exhibit No. 1, and this is the front door and the living room and the dining room and the kitchen and the two bedrooms. Do you see that?

A. Yes.

Q. Does that look like the house you used to live in at 4201 Prospect?

A. Yes.

Q. Show Judge Hanna where you and Raymond were sleeping.

what bedroom were you in?

A. (Indicating).

Q. And point to where you saw these two men, the fat chubby man and the man with the natural hairdo.

A. (Indicating).

Q. Right in that hallway there?

A. Yes.

Q. All right. What were they doing when you saw them there?

A. One was looking in this room and one was looking at me and Raymond.

Q. One was looking at you and Raymond.

A. Yes.

Q. Did he say anything to you?

A. Yes.

Q. What did he tell you?

A. When I was about to get back up, he told me to lay back down.

Q. Which one of the two men was that that talked to you, the fat chubby one or the one with the natural hairdo?

A. Natural hairdo.

Q. All right. What did the two men do after that?

A. The guy with the natural hairdo went in the kitchen and got a knife.

Q. Got a knife. Okay. At any time while you were in the bedroom, Deonte, did the men come into the bedroom, any of the three men?

A. Yes.

Q. What did they do when they came in?

A. One ripped out a cord from the fan and one went in there to get the knife.

Q. Do you remember which of the men that was?

A. To get the knife?

Q. Yes.

A. There was three guys, and I think the guy with the Afro went in to get the knife from the one with the natural curl, natural hair.

Q. One of the men had an Afro, is that right?

A. Right.

Q. Is that the man that you told me you first saw go into the bathroom?

A. Yes.

Q. Now, at some point, did any of these men tie up you and

your brother?

A. Yes.

Q. And how many of the men did that?

A. Two.

Q. Do you know which ones?

A. The one with the natural hair and the one with the Afro.

Q. Did you get a good look at them when they were tying you up?

A. Yes.

Q. Tell me, now, were the bedroom lights on?

A. No.

Q. Was there any light coming into your bedroom?

A. No.

Q. How were you able to get a good look at them?

A. Because they were almost up in my face.

Q. They were real close to you?

A. Yes.

Q. Did they do anything else to you, other than tie you up?

A. No. Later they did.

Q. Later what happened?

A. The guy with the natural hair went and took the knife and stabbed my mother and I started to cry and the guy with the - - the fat chubby one came and told me that everything would be all right and I was still crying so he hit me in the side of my head four times.

Q. The fat chubby guy hit you?

A. Yes.

Q. He is the guy that you earlier told me was named what?

A. A.J.

Q. A.J. You're sure it was him?

A. Yes.

Q. After this was all over, Deonte, did you talk to the police officers about what happened?

A. Yes.

Q. Do you remember whether or not you told them about A.J.?

A. Yeah, I told them.

Q. Did they show you some pictures?

A. Yes.

Q. When they showed you the pictures, what did they ask you to do.

A. See if that's any of them that was in the accident.

Q. All right. Handing you State's Exhibit No. 121, have you ever seen that picture before?

A. Yes.

Q. And who's that?

A. Looks like A.J. to me.

Q. Is that the only picture that you picked out when the police officer showed you pictures?

A. No.

Q. Did you pick somebody else out?

A. No, it was the same picture but he had his hair cut shorter.

Q. Okay. But you know that's A.J.?

A. Yes.

Q. And he's the one that you saw the night that your mom got stabbed?

A. Yes.

Q. Did you pick out pictures of any of the other two men?

A. No.

Q. And why not?

A. Because it didn't look like any of them.

MR. BERRIGAN: Those are all the questions that I have. Thank you, Deonte.

CROSS-EXAMINATION BY MR. HALL:

Q. Deonte, where was Uncle Bam living, what house was he living at, do you know; can you describe it for us?

A. He was living in a white house and it was the second one from the corner.

Q. It wasn't the corner house?

A. Right.

Q. Okay. And you went over to the second house from the corner that night?

A. Yes.

Q. And when you got over there, your mom wasn't there?

A. Right.

Q. And your mom never came there that night while you were there?

A. Right.

Q. What time did you leave Uncle Bam's house that night, do you know?

A. No.
Q. Had you watched any TV?

A. Yes.

Q. What did you watch on TV?

A. I watched the Adam's Family and - - I can't remember the other one.

Q. Was it dark when you left Uncle Bam' s house to go home?

A. Yes.

Q. And Uncle Bam walked you home?

A. Yes.

Q. When you got home, who was all there?

A. My mom, Don, and this guy in the black.

Q. Was there a woman there?

A. Yes.

Q. Had you seen her before?

A. No.

Q. Deonte, did you see the man cut your mother?

A. No.

Q. You didn't see that?

A. No.

Q. When the police officer showed you the pictures that day, do you remember down at the police department - -

A. Yes.

Q. - - didn't you just tell him that you had seen A.J. before?

A. Yes.

Q. Did you tell him that A.J. was one of the men who did this?

A. Yes.

Q. I show you this picture, it's marked as State's Exhibit No. 102. Do you recognize that man at all?

A. Sort of.

Q. How do you sort of recognize that man?

A. His curl.

Q. What is it about his curl?

A. It's short.

Q. Okay. How is it you kind of recognize that man?

A. Sort of like his face. That's about it.

Q. What is it about his face you recognize?

A. His eyebrows.

Q. Okay. How do you recognize his eyebrows?

A. They are sort of sticking up.

Q. The man in that picture, have you seen him anywhere

before?

A. No, I don't think.

Q. Why do you say he looks familiar to you?

A. I don't know.

Q. Does he look like any of the men that were over at your house that night?

A. A little.

Q. Which of the men does he look like, Deonte?

A. The short one with the natural hair, almost.

Q. The short one with the natural hair. Did you see him over at Uncle Bam's earlier that day?

A. Yes.

Q. You did?

A. Yes.

MR. HALL: No other questions.

REDIRECT EXAMINATION BY MR. BERRIGAN:

Q. Do you know the difference between jehri curl and natural hairdo?

A. Yes.

Q. Tell us what do they look like. What's a jehri curl look

like?

A. Jehri curl looks like little bits of string curled up. And a natural curly hair looks like - - just looks like regular hair but soft and curly.

Q. All right. You know the difference between a jehri curl and a natural hairdo, is that right?

A. Right.

Q. Do you get those mixed up at all?

A. Yes, sometimes.

Q. Sometimes. What about this guy? Mr. Hall showed you this picture, State's Exhibit 102. What kind of hairdo does that guy have?

THE COURT: What picture is that?

MR. BERRIGAN: 102, Judge.

A. A curl.

Q. (By Mr. Berrigan) That's a jehri curl, isn't it?

A. Yes.

Q. Now, you told me that this fellow that was at Bam's house, along with A.J., he had a natural hairdo, didn't he?

A. Yes.

Q. All right. Is that right?

A. Right.

Q. Does that guy have a natural hairdo?

A. No.

Q. The fellow that stabbed your mom, is that the same fellow that told you to shut up?

A. No.

Q. No. Did the fellow that you say stabbed your mom, did he say anything to you at all?

A. No.

Q. Is he one of the guys that tied you up?

A. Yes.

Q. Did you have a good chance to get a good look at him when he was tying you up?

A. Not that good.

Q. Isn't he one of the guys you told me was right next to your face?

A. Yes.

Q. But you didn't have a chance to get a good look at him?

A. No, not that one, but I got a good look at the other one.

Q. A.J.?

A. Right.

Q. You're pretty sure about A.J., aren't you?

A. Yes.

Q. You're not sure about the other two guys because you didn't get a good look at them?

A. Right.

Q. Okay. When Mr. Hall showed you that picture, you said something about - - and I'm talking about this same one here, you said something about that's not it. What did you mean by that?

A. His hair is sticking out and this is the way - - the way I seen it, his hair was not out that way (indicating).

Q. Deonte, you're sure that the fellow that you saw, the two fellows that you saw at Bam's, A.J. and this other guy, were the same people that you saw at your own house, is that right?

A. Right.

Q. And these are the fellows that were playing cards with your Uncle Bam?

A. Yes.

Q. Selling drugs with him?

A. Yes.

MR. BERRIGAN: I don't have any other questions. Thank you.

RECROSS-EXAMINATION BY MR. HALL:

Q. Deonte, did any of the men that were over at your house and did this thing over at your house that night, did any of them have a jehri curl?

A. Sort of.

Q. So one of them did have a jehri curl?

A. Probably, I don't know.

Q. You just don't know?

A. Yes.

MR. HALL: No other questions.

MR. BERRIGAN: I don't have any other questions.

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI AT KANSAS CITY

STATE OF MISSOURI,	)	**CR87-1997**
	)	
Plaintiff,	)	
vs.	)	
	)	
ROGER BUCKNER,	)	**Sept. 15, 1988**
	)	
Defendant.	)	

THE DEPOSITION OF THE WITNESS DEONTA KINNEY

produced, sworn and examined, between the hours of 8:00 a.m. and 7:00 p.m. of September 15, 1988, at the Office of the Pubic Defender, 10th Floor Jackson County Courthouse, 415 E. 12th Street, Kansas City, Jackson County, Missouri, before

PHYLLIS M. MAIER, CSR
Registered Professional Reporter

a notary public in and for the State of Missouri, in the above-entitled cause; taken on behalf of the defendant.

APPEARANCES

For Plaintiff: Mr. Patrick B. Hall
Asst. Prosecuting Attorney
7-M Jackson County Courthouse
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For Defendant: Mr. Patrick Berrigan

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EXHIBITS

(None Marked)

TRANSCRIPT COPY
MR. HALL MR. BERRIGAN

SIGNATURE

The witness's signature to his deposition is waived.

DEONTA KINNEY

a minor, being produced, sworn and examined on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MR. BERRIGAN:

Q. Deonta, I'm going to be asking you some questions, and maybe Mr. Hall, about the day that your mom had her neck cut. - -

A. Uh-huh.

Q. - - way back in January of last year. Okay?

A. (The witness nodded.)

Q. And one of the things that you need to do when you're answering the questions is just answer Yes or No, whatever it is that you want to say, and tell me a little bit about what it is that you know, okay?

But there is one thing that we need to do, is that you need to answer like say Yes and say No instead of shaking your head, because I would shake my head usually if I was answering questions. But in order for this lady to write down everything that we say, we have to talk. Okay?

A. Okay.

Q. The other thing is that there's no reason to be nervous. This isn't any kind of test or anything. Just tell us what you remember, that's all. Okay?

A. Okay.

Q. How old are you, Deonta?

A. 12.

Q. What grade of school are you in?

A. Fifth - - I mean, Warford.

Q. I'm sorry - - I didn't hear you.

A. Warford, the school.

Q. Warford School. and you're in the fifth grade?

A. Right.

Q. You're a year ahead of your brother, right?

A. Uh-huh.

Q. And you're smarter than him?

A. Yes.

Q. Where do you live now, Deonta?

A. 11018 Wabash.

Q. Here in Kansas City?

A. Yes.

Q. Who do you live with there?

A. My grandfather.

Q. Did you say your mother and father?

A. My grandfather ad my grandmother.

Q. I see. Okay. What are their names? - - your grandmom and your granddad.

A. Harold Kinney and Joanne Kinney.

Q. Did you say your grand - - let's see, your granddad, what was his name?

A. Harold.

Q. Harold - - that's my dad's name. Harold Kinney, okay. And your mom's name is Carol Kinney, right?

A. Right.

Q. Do you remember that day that - - I guess it would be that night that your mom got her throat cut?

A. Yes.

Q. We seem to think that was a Monday. Is that how you remember it, is that a day that you went to school?

A. Yeah, it was a day I went to school.

Q. Tell me about what you did after school that day.

A. That day after school me and my brother walked over to my uncle's house.

Q. What's your uncle's name?

A. Bam.

Q. Bam Kinney?

A. Yeah.

Q. Does he ever call himself Ben or Benjamin?

A. Calls himself Benjamin, and sometimes Ben.

Q. And he also goes by Bam, too; is that right?

A. Yes.

Q. Is that what his friends call him?

A. Yes.

Q. Do you know where he lived back then.

A. No.

Q. Was it near your school?

A. Yes.

Q. How did you know to go over there after school?

A. The morning before - - that morning, when my mom was walking out the door, she gave me a letter to give to the principal.

Q. What did the letter say?

A. For me and my brother to go over to my uncle's house.

Q. And did just you and your brother walk over to your uncle's after school?

A. Yes.

Q. How come you needed a letter for the principal?

A. Because for my - - for them to call my uncle for my uncle to know that we were coming over.

Q. I see. After school was out?

A. Right.

Q. What time did you get out of school back then?

A. 3:30.

Q. And did you go right over to your uncle's without stopping?

A. Yes.

Q. What did you do once you got over there?

A. Me and my brother - - yeah, we did our homework, and went back - - and then we went up to the park.

Q. Now, when you went over to Bam's with your brother Raymond, who was over at Bam's house?

A. About three guys.

Q. Do you know who they were?

A. One chubby one, one tall and skinny, and one short one with the curl.

Q. The chubby man, what was his name?

A. I think his name was A.J.

Q. And had you ever seen him before?

A. No. That was the first day.

Q. The man that was tall, did you say he was tall and skinny?

A. Yeah, and had an Afro.

Q. An Afro style haircut?

A. Yeah.

Q. Was it a long Afro or a medium or a short one?

A. I'd say it was a medium.

Q. Do you know his name, the man with the tall, skinny body and the medium Afro?

A. No.

Q. Had you ever seen him before?

A. No.

Q. When you say he was tall, was he taller than Bam?

A. No, about the same size.

Q. He was taller than the chubby man?

A. Yeah.

Q. What about the shorter fellow with the curl? Let me first ask you, what do you mean by a curl?

A. He had a jerri curl.

Q. A jerri-curl haircut?

A. Yeah.

Q. Do you know his name?

A. No.

Q. Had you ever seen him before?

A. No. That was the first day.

Q. And these three men were all over there with Bam or were they there by themselves?

A. With Bam.

Q. What were they doing, Bam and these three men?

A. They were playing cards.

Q. Was there anybody else over at Bam's house when you and Raymond got there after school other than Bam and these three men?

A. No.

Q. You say that after you got to Bam's you did your homework; is that right?

A. Right.

Q. Did somebody watch you do that or tell you to do your homework?

A. We did it on our own, but those three guys were watching.

Q. Then after you did your homework where did you go?

A. Up to the park.

Q. Who went up to the park?

A. Me and my brother and Bam's son.

Q. Do you know Bam's son's name?

A. Rodney.

Q. How old is Rodney?

A. He was three.

Q. Does Bam have a son named Ronnie?

A. Yeah - - that's his name. I get his name mixed up.

Q. Is it Ronnie or Rodney?

A. Ronnie.

Q. Does Bam have any other children?

A. Yeah, a little girl.

Q. What's her name?

A. Jasmine.

Q. Jasmine?

A. Yes.

Q. So Ronnie was over at Bam's house then, too; is that right?

A. Right.

Q. Was there anybody else, then, other than the people you've already told me about?

A. No.

Q. Was Bam's wife or girlfriend there, Gwen?

A. Yeah, but she was next door at her mother's house.

Q. Do you know her mother's name?
Does Dorothy, does that ring a bell?

A. Yeah, Dorothy.

Q. Dorothy; is that right?

A. Yeah.

Q. That's Gwen's mother?

A. Right.

Q. Do you know what Dorothy and Gwen were doing?

A. No.

Q. Where was your mom when you went over to Bam's house?

A. At work.

Q. Do you know where Don Wright was?

A. No.

Q. How long did you stay up at the park?

A. About an hour.

Q. And then what did you do after you left the park?

A. Me and my brother and Ronnie went back home, down to Bam's house, to get a drink, but only those two went back up to the park after we got a drink and I stayed in to watch television with Bam.

Q. So you and Raymond and Ronnie all came back to get a drink, then Ronnie and Raymond went back to the park and you stayed at Bam's house?

A. Right.

Q. You say you watched television?

A. Right.

Q. Do you remember what you were watching on TV?

A. The Addams Family.

Q. The Addams Family . What channel are they on anymore?

A. I don't know.

Q. You don't know? Okay. Who were you with then when you were watching television at Bam's?

A. I was sitting on the couch, right next to Bam.

Q. So Bam wasn't playing cards anymore, then?

A. No. He quit.

Q. What about the other three men, were they still playing cards?

A. Yes.

Q. Who was playing now that Bam had left?

A. Only - - only the three guys. But then they started to arguing.

Q. What were they arguing about?

A. About who was winning or not - - who was winning or not.

Q. And the only one of the three that you knew the name of was this A.J. guy?

A. Right.

Q. How did you find out his name?

A. Because the - - that day, when they were about to leave, there was a blue Trans Am pulled up and this girl and this other guy got out of their truck - - I mean, the car, and then came in the house.

And then when - - I was watching TV, and the girl said, Let's go A.J. So A.J. got this bag that was full of money and went and got into the car.

Q. And the girl was talking to this chubby fellow that you had seen playing cards?

A. Right.

Q. And he got up and went with her?

A. Uh-huh.

Q. Yes or No?

A. Yes.

Q. That's another thing we talked about earlier. You answered, but you have to say Yes or No, okay? It's kind of like a game that we play. I understand what you mean but it's just so that we can get it down right. Okay?

A. Okay.

Q. So you found out who A.J. was when this girl came over with this guy out of a blue Trans Am, right?

A. Right.

Q. Let's go back to when you were watching television, for a second, with Bam. Okay?

A. Okay.

Q. Who was at the house at that point other than Bam and you and the three men that you had seen playing cards?

A. That was probably it.

Q. Did you watch any shows other than the Addams Family?

A. No.

Q. What did you do after you watched the Addams Family?

A. Went outside to see what my brother was doing.

Q. Did you go back to the park?

A. No.

Q. Where was your brother when you went outside.

A. They were up on a hill, playing around.

Q. So they had left the park, then?

A. Yeah.

Q. Did you play with them outside for a while, or did you come right back in?

A. I told them to come in, because it was getting dark, and so they came in.

Q. Now, when your brother came in with Ronnie - - there was you and your brother, Raymond, and Ronnie, the three men, and Bam still in the house, right?

A. Right.

Q. Did anybody else come into the house during the course of the evening?

A. Yeah. Gwen.

Q. Was Gwen the next person that came?

A. Yes.

Q. Gwen came over from next door; is that right?

A. Yes.

Q. Did anybody give you any food to eat?

A. No.

Q. What did you guys do after Ronnie and Raymond came inside?

A. We didn't do anything, because it was almost time for me and Raymond to go. So we went into the playroom, played for a little bit.

Q. Played in the playroom?

A. Right.

Q. During the time that you had a chance to see these three men playing cards, and Bam, did you see anybody selling anything?

A. Yeah, the three men.

Q. What were they selling?

A. That crack and cocaine.

Q. You know what that is, crack cocaine?

A. Yeah, it's that powdery stuff, and the crack is the hard rocky stuff.

Q. The cocaine is kind of white powder, is that right?

A. Right.

Q. And then you say the crack is - - what does it look like?

A. It's sort of little yellow, and it looks like pieces of rubber,

but it isn't.

Q. Kind of like a small piece of rubber or a rock?

A. Yeah.

Q. But it's yellow.

A. Right.

Q. What does it come in? Does this come in a bag of some type?

A. Yeah, it was a small - - it was like, you know, Reynolds stuff that - - you snap this shut. They used those. But they were smaller.

Q. Those teeny-tiny little plastic bags?

A. Right.

Q. They look like the kind of bags that you would put your sandwich in, right, they'd have a zip-loc top; is that right?

A. Right.

Q. Only they're just little ones.

A. Yes.

Q. These men that were selling the crack cocaine, who were they selling it to?

A. About to everybody that they seen, almost. They asked them, and then the people would probably say Yes, because I seen them selling it to people that was in cars coming up our

block. Some people got out of the car and came up to the house and rung the doorbell, because they already new that they were selling it.

Q. Did you know before you went over to your Uncle Bam's house that day that that's something that took place at that house, that people sold drugs there?

A. Yes.

Q. How long had that been going on, the best you know?

A. About two or three weeks.

Q. Had you ever been there before when people were selling drugs at Bam's house?

A. Yes.

Q. And you say that people came up in cars and they would get out? And what would they do?

A. Come up and ring the doorbell, and Bam would answer it.

Q. Was it always Bam that answered the bell?

A. No.

Q. Who else answered?

A. The other guy - - I've forgotten his name. Gwen would answer the door, or Gwen's mother.

Q. So either Dorothy or Gwen or Bam - -

A. Uh-huh.

Q. - - or some other guy?

A. Right.

Q. This other guy, was that one of the three men that you saw playing cards?

A. No.

Q. Some other fellow?

A. Right.

Q. He wasn't there that night?

A. No. Sometimes - - selling wasn't going on at Bam's house, it was going over at Gwen's mother 's house.

Q. I see. So nobody was coming up to Bam's house, they were going over to Dorothy's house?

A. Right. Because Dorothy was the only that was selling it, making the stuff, and Bam was just giving it to them.

Q. Bam was the one that gave it to the customers?

A. Right.

Q. How was Bam able to do that if he was over at his house and Dorothy was making it over at her house?

A. You know, sometimes - - you know, Gwen's mother would call over at Bam's house and tell - - and Gwen - - Gwen would tell Bam to come on over because they have customers and because they wouldn't - - because Gwen and Dorothy were never sure that - - they didn't want to be seen. They were just

back there making it, and they would always tell Bam to go in there and give it to them.

Q. I see. The night that we're talking about, did Bam have to leave his house and go over to Dorothy's to sell some of this cocaine?

A. No. Only the people that was there were selling it.

Q. The people that were where?

A. You know, the three guys. They were the only people that were selling it that night.

Q. Now, I'm a little confused, because these three guys that were playing cards and selling the cocaine, weren't they over at Bam's house?

A. Right. You know, after the customer leaves from Dorothy's house, Bam would go back over to his house, after a few customers come.

Q. And these other men, they would do the same, go over to Dorothy's , and then come back?

A. No, they'd stay. But then they would tell Bam - - they would stay at Bam's house until Bam run that stuff that they make over at Bam's house over to Gwen's house, so Bam was the one that was giving - - they were telling Bam to give the stuff to the customers.

Q. And where were these men getting this cocaine?

A. I don't know.

Q. Did they have it with them?

A. Yes.

Q. And they would just give it to Bam and he'd go over to Dorothy's and give it to people that came up to her door?

A. Yes.

Q. Was Bam bringing back any money for these men?

A. No. They would tell - - they would tell Bam to keep the money over at Gwen's mother's house.

Q. I see.

A. They keep it in this big box.

Q. And you've seen this box of money?

A. Yes. Well, it ain't quite a box. It's a big sack that stands like that (indicating).

Q. How much money was in there?

A. It was $20 bills, 10's and 5's and 1's.

Q. How big of a sack is it?

A. About like that (indicating).

Q. Is it as big as a grocery sack, like this (indicating)?

A. Yeah, but it had a handle on it.

Q. It had a handle on the top?

A. Yeah, a stringy handle.

Q. Is it the same size as that kind of a sack?

A. Yes.

Q. Full of money?

A. But it was supposed to - - you know, it was a sack that had - - you know, when you get clothes, they put them in that kind of sack, and they have a handle.

Q. That you can carry?

A. Yeah. They had it in that.

Q. But is it the same size as this (indicating)?

A. Yes.

Q. Was it full of money?

A. Yes.

Q. Did you see it on the night that your mom got stabbed?

A. Yeah, it was the same night.

Q. And was it fully of money that night?

A. Yes.

Q. Well, when Gwen came over from Dorothy's, what did she come over for?

A. To feed her baby and give Ronnie some supper, because me and Raymond didn't want any.

Q. You didn't want any food?

A. Huh-uh, because it was about time for us to go home.

Q. How did you know when you were supposed to go home?

A. My mother called.

Q. I see. Did she call Bam's house?

A. Yes.

Q. Did you talk to her?

A. Yes. She said for me - - she said we have school in the morning, so tell Bam that we've got to go home now.

Q. Do you know what time it was, Deonta, when your mom called?

A. Yes. It was about 6 or 6 after - - I mean - - yeah, 6 after 6 - - I mean 6 after 9.

Q. 6 after 9?

A. Yes.

Q. How do you know what time it was, how do you remember that?

A. Because you can see off the clock at Bam's house.

Q. When you were on the phone, you could see the clock?

A. Yes.

Q. I guess what I mean is How you remember that so clearly that you - -

A. I don't know.

Q. You just - -

A. Because I can remember when my mother called.

Q. Okay. What did your mom tell you about when she was coming to get you?

A. She said we had school in the morning, and she didn't want us staying up so late, so we had to go home.

Q. Now, getting back to these three men that were playing cards and selling crack cocaine, did you have an opportunity to hear some of the men talk to each other?

A. Yeah, A.J. had - - you know, the fat, chubby one?

Q. Yes.

A. He had - - he had a gun right there where he was sleeping on the couch, because he fell asleep.

And then you can hear - - you can smell the cocaine and crack that they were burning, because Bam came in there and said that the police were coming, so they shut the door on Bam's leg almost, but Bam got out of the way in time and they locked it - - the door.

So me and Raymond ran in the playroom, locked the door, and kept it shut, and put something - - something under the door for them to make - - getting the smell in the door.

Q. When did all that happen when Bam said the police were coming?

A. They hurried up and took almost all of the crack out of the bag and put it on - they put it in this kind - - this pipe, and they put it on the stove, and they just cut the stove on high and it burned it.

Q. Did they do that on purpose?

A. Yes.

Q. Why did they do that?

A. Because they didn't want the cops catching them.

Q. They were trying to get rid of this crack cocaine?

A. Yes.

Q. You say that you could smell the cocaine. Could you smell it before they started to burn it?

A. No, you could smell it coming through the doorway, even though you put something there.

Q. But that was only after they tried to burn the cocaine when Bam said the police were coming?

A. Right.

Q. Do you know why Bam said the police were coming?

A. Yeah. Because the police cars going up the street, turning around and come down the street, they keep doing that, and the helicopter kept flying over Bam's house.

Q. Have you ever seen the helicopter flying around with its big light - -

A. Yes - - yes.

Q. Did it have its lights on Bam's house?

A. Yes.

Q. Do you remember if that was before or after your mom called on the telephone?

A. After.

Q. After?

A. Yeah, and Bam knocked on the door when the police went away - - he said, Yeah - - he said that It's about time for you guys - - you guys should be in bed already, so get going. So me and Raymond said goodbye to Ronnie and went out the door to walk home.

And then we got home, and there was my mom and Don and this other guy playing cards.

Q. All right. Now, before we get to that, I wanted to ask you a question about these three men that we selling the crack cocaine and playing cards.

I asked you if you had a chance to hear them talk - -
A. Uh-huh.

Q. - - and you told me about A.J., right?

A. Right.

Q. Do any of those men have any strange accents? Do you know what an accent is?

A. Huh-uh.

Q. Do they talk funny?

A. Yes. They almost talk like us, but has this weird voice in it. They almost. But their words don't come out quite like ours.

Q. Could you imitate how they talk?

A. Huh-uh.

Q. No?

A. Huh-uh.

Q. Had you ever heard anybody else talk like that?

A. No.

Q. Do you yourself know anybody that's from Jamaica or people called Jamaicans?

A. No, I don't know anybody else except for A.J.

Q. How do you know that A.J. is Jamaican?

A. Because Bam told me that - - he said, you know, when we were coming home, there was - - there was three dudes - - people were there.

So I went over to Bam's, I asked, Who is coming - - who is getting out of the car, and he said, Oh, be a couple of my Jamaican friends.

Q. When did you have this conversation with Bam?

A. Right when we got in the door, we seen the three - - the three people getting out of the car.

Q. And they were going to Bam's?

A. Right.

Q. This is when you and your brother, Raymond, first got over to Bam's house?

A. So I went over to Bam to ask him who was that.

Q. And what did Bam say?

A. A couple of my Jamaican friends.

Q. But there were three men, weren't there?

A. I know - - but he meant to say three.

Q. Did they all talk the same way?

A. No, not - - only one of them did. It was the one with the curl.

Q. The one with the curl?

A. Right.

Q. Did he talk funny - -

A. He talked like us.

Q. He talked regular - -

A. Right.

Q. - - and the other two men, they talked kind of funny?

A. Right.

Q. And Bam told you they were his Jamaican friends?

A. Right.

Q. But one of the men didn't talk funny?

A. He didn't talk - - so I was right the first time about the couple, only two was talking Jamaican, one was talking regular.

Q. You were right, when Bam said a couple of my Jamaican friends, only two of the men talked funny?

A. Right.

Q. And Bam told you one of those guys - -

A. Were not. He said, Two are Jamaican and one is regular.

Q. Now, the regular guy, the guy that talked regular, was he the man with the jerri curl - -

A. Right.

Q. - - or was he A.J. or was he the tall, skinny man with the Afro?

A. He was the one with the curl.

Q. The jerri curl?

A. Yes.

Q. And you say that A.J. and the tall skinny man with the Afro, they both talked funny?

A. Right.

Q. And those are the people that Bam indicated to you were Jamaicans?

A. The one that was tall, I think he talked funny, because it sounded like he does.

The one with the jerri curl tried to talk like the Jamaican, but me and my brother knew he wasn't, because you can tell, when he came in - - first he was trying to talk like one, because he had the knife up to Don's throat. And when he came in to get the knife, he said, Let me have the knife. So I knew that he wasn't Jamaican.

Q. Now, you've jumped ahead of me quite a bit there. I was talking about the three men that were over at Bam 's.

A. Uh-huh.

Q. Are those the same three men that came over later in the night at your house?

A. Yes.

Q. Are you sure about that?

A. Ye.

Q. You're telling me that the three men that you saw at Bam's house, playing cards, are the same three men that came over to

your house?

A. Yes, they might be.

Q. What do you mean, they might be?

A. Because the jerri-curl - - the one with the jerri curl looks exactly the same as the one that came over to our house, and the one that was skinny, had like bellbottoms and an Afro, he was the one - - he looked exactly like the one that came to our house but had on different clothes, because they had left right when we went out the door.

Q. When you and Raymond left Bam's, these other men left Bam's?

A. Right.

Q. Did you see how they left his house, Bam's house?

A. No. We - - I didn't pay any attention. I just kept walking.

Q. Now, you told me that, as you remember it, when you left Bam's, you and Raymond just walked home?

A. Right.

Q. You're sure that your mother, Carol, didn't come over and pick you up?

A. She didn't come and pick me up because our house wasn't far from Bam's.

Q. And you and Raymond walked home alone, then; is that right?

A. Right.

Q. When you got home, who was there at your house?

A. Only - - only Don, my mom, and this other guy.

Q. Do you know the name of this other guy?

A. No.

Q. Now, at that time you were living where?

A. On Prospect somewhere, I don't know - -

Q. Is that 4201 Prospect?

A. Yes.

Q. On the corner of 42nd Street and Prospect?

A. Yes.

Q. This other man that was there at your house with Don and your mom, Carol, had you never seen him before?

A. No.

Q. And you don't know his name?

A. No.

Q. Now, what were they doing when you and Raymond came in?

A. They were playing cards.

Q. And what did you do when you and Raymond got home?

A. We had - - we had to go straight to bed.

Q. And did you go straight to bed?

A. Yes.

Q. Did you go to sleep?

A. I did, but my brother couldn't sleep.

Q. How do you know your brother couldn't sleep if you were asleep?

A. No, he - - he woke me up right almost in the middle of the night.

Q. Okay.

A. But my mother was still awoke.

Q. When you went to bed, you and your brother, you're telling me that you fell asleep right away?

A. Right. Not right away, but it didn't take me long.

Q. Where were you sleeping then?

A. In my mother's room.

Q. What color is her room?

A. It's white.

Q. The walls are white?

A. Right.

Q. Where is that located in the house?

A. It's the room right in back of the living room.

Q. Now, you kind of had two living rooms in that house, didn't you?

A. Yes.

Q. Is one in the front of the house, when you come in the front door - -

A. And one in the side.

Q. And one in the side?

A. Right. And there's a little doorway right there in the one on the side, you can go straight in there where the bedroom was.

Q. Okay. So this bedroom was right behind the living room that's on the side of the house?

A. Right.

Q. When you went to bed, and you last saw your mother and Don Wright and this other man, what were they doing?

A. All they were doing was playing cards and talking.

Q. Could you tell me what room they were in?

A. The front - - the one - - right when you go in the door, the one in front.

Q. The front living room?

A. Right.

Q. You woke up during the night; is that right?

A. My brother woke me up.

Q. How did your brother wake you up?

A. He kept shaking me until I woke up.

Q. Did he say anything to you?

A. Yes.

Q. What did he say?

A. He told me that he couldn't sleep. So I said, Just go in there and tell mom that you couldn't sleep. And so he went to tell mom. And she just said, Lay down in the bed and just shut your eyes.

So Raymond tried it. Then he got some sleep. And then when we heard the door bust open, he woke up.

Q. When Raymond went in to talk to your mom about not being able to sleep, did you go with him or stay in the bedroom?

A. Stay in the bedroom.

Q. And he came back to the bedroom then?

A. Right.

Q. And went to sleep?

A. Right.

Q. Did you go to sleep, too?

A. I was already asleep.

Q. So you just woke up when your brother told you that he couldn't sleep, and then you went back to sleep?

A. Right.

Q. You never got out of bed. Right?

A. Right.

Q. Okay?

A. Right.

Q. You woke up again later, is that right?

A. Yes.

Q. How did you wake up this second time?

A. Raymond - - this time Raymond pushed me out of the bed.

Q. He pushed you out of the bed?

A. Right.

Q. Did he say anything to you when he did that?

A. Yes. He was scared, so he jumped like (indicating) - - he just made a sudden jump and pushed me out of the bed. So that woke me up, and told me that someone was in the house.

So I got back in the bed and acted like I was asleep.

Q. Why did you do that?

A. Because I didn't want to - - I didn't know who it was and I was trying to go back to sleep.

Q. Did you see anybody at that time, Deonta - -

A. No.

Q. - - when Raymond said something had come in the house?

A. No. I didn't get up.

Q. You just went and pretended you were asleep?

A. Right.

Q. Were you - -

A. I was about to get up until this guy came and looked in the bathroom, and then I was about to get out of bed, he said, Lay back down, so I got back into bed.

Q. Now, that man that looked into the bathroom, did he come into the bedroom?

A. Yes.

Q. What did he look like?

A. That was the tall one with the Afro.

Q. And what kind of clothes did he have one?

A. He had on - - I think a black jacket. And they all had gloves on.

Q. I think you told me earlier that one of the men had changed clothes from the time that you saw him.

A. They all did.

Q. They all did. All right.

A. Right. Because when A.J. came in - - when I saw A.J., he had one some dress pants, some dress shoes, and a dress shirt.

Q. Now, when was he wearing the dress pants and dress shirt - -

A. When he was over at Bam's, playing cards.

Q. Okay. And then you saw him again later at your house?

A. Right.

Q. What kind of clothes can A.J. have on then?

A. He had on a black jacket, I think some jeans, and he had on yellow biking gloves with the fingers cut out.

Q. The man that came into the bedroom first, the first man that you saw when you woke up after your brother pushed you off the bed, he had on a black jacket and gloves, is that right?

A. Right.

Q. Do you remember what color gloves he had on?

A. Black.

Q. This jacket, do you know what kind of material it was made out of?

A. I think it was leather or something.

Q. Have you seen black leather jackets before?

A. Yes.

Q. Do you know what they look like?

A. They feel kind of - - they feel like - - like those kind of books right there, the red, they feel like those.

Q. This kind of book here (indicating)?

A. Yeah, but it's smoother.

Q. Smoother. Okay. Did the tall man with the Afro, with the black jacket and the black gloves, did he have any kind of facial hair like a mustache or a beard or anything like that?

A. I can't remember that. All I can remember is his hair.

Q. He's one of the men that you told me earlier talked funny, like a Jamaican; is that right?

A Right.

Q. Was he still talking that way when he told you to get back in bed or be quiet or whatever he said to you?

A. When he said Be quiet, he didn't sound like Jamaican.

Q. Did you ever hear him say anything else while he was over at your house - -

A. Yes. - -

Q. - - on Prospect?

A. No. I think that's it. Yes, that was all he said, because he was busy ripping out the cord to the fan and getting tape from the other room.

Q. The fan that he was taking the cord off of, where was that located?

A. In the bedroom where we were.

Q. Did he do that right then when he was telling you to be quiet?

A. No.

Q. When did he do that?

A. He did it after he looked in the bathroom and then he came back in the room. And then he ripped out the cord.

Q. Did he do anything else when he first came in the bedroom other than to tell you to be quiet?

A. No.

Q. Why was he telling - -

A. Yes.

Q. What?

A. When he sliced my mother's neck, he dragged her - - he dragged her in there, turned up the TV real loud.

Q. Wasn't that later on?

A. Right.

Q. I'm going to get to that in just a minute. But when he first came in the room and told you to be quiet, did he do anything?

A. Yes. He went to use the bathroom. That's it.

Q. He went to use the bathroom?

A. Right.

Q. Could you tell whether or not he used the bathroom?

A. Yes. You can hear it, and you could hear him flush the toilet.

Q. Do you remember what kind of pants that man had on?

A. Huh-uh.

Q. No?

A. No.

Q. What about his shoes, do you know what kind of shoes he had on?

A. No.

Q. But you do remember that it was the black leather jacket and some black gloves?

A. Right.

Q. After the man came in and told you to be quiet, what's the next thing that happened?

A. This guy - - the man with the curl had - - had a knife up to Don's throat.

Q. Now, were you able to see Don from where you were in the bedroom?

A. No. But I could - - afterwards, you - - - - I can tell that part later.

Q. How did you see this man with the curl with the knife up to Don's throat?

A. You could see him when he went to get the knife from the kitchen.

Q. You saw the man with the jerri curl get the knife out of the kitchen?

A. Right.

Q. And you saw that from where you were in the bedroom?

A. Right.

Q. Were you still in the bed?

A. No.

Q. Where were you?

A. They told me and my brother to stand up and get against the wall.

Q. Who told you that?

A. The skinny one.

Q. The man with the - -

A. Afro.

Q. - - Afro. All right. And you got up and stood against the wall?

A. Right.

Q. And this was in the bedroom still?

A. Yes. And then - - yeah. Then they took the wire, wrapped it around both of my brother's feet, and then they did me the same. And then they took an even longer one and wrapped it around both of ours.

And then they wrapped our hands, like one of my hands were attached to Raymond's and one of - - and the other one was attached to Raymond's.

Q. I want to try to get this in order, I mean, what happened first and then happened second and then third. Okay?

A. Okay.

Q. Let me ask you this. After the man with the Afro came in and told you to be quiet, what is the very next thing that happened?

A. The very next thing that happened. Yeah, you can hear Don keep telling the man that he doesn't have any money.

Q. Could you hear the man saying something to him?

A. Yes.

Q. What was the man saying?

A. He said, Don't be giving me that stuff. And then - - he had the knife up to Don's throat, and then Don said, Don't kill me, so he sliced his neck.

Then the other guy picked him up just to make sure.

Q. I'm going to interrupt you right now. Did you see the man cut Don's throat?

A. No. You can hear - - you know how people yell, and then the spit come sup and - - then you can hear them holler and the spit coming up at the same time.

Q. And you could hear that taking place but you couldn't see them?

A. Right.

Q. Could you tell from where the voices were coming from where Don was?

A. Yes.

Q. Where was he?

A. In the room right when you come in the door, the first one.

A. The front living room?

A. Right.

Q. And then at the time that you heard this, what you think was

Don's throat being cut, could you see any of the three men?

A. I could only see one.

Q. Which one could you see?

A. The tall one.

Q. The tall man with the Afro?

A. Right.

Q. What was he doing at the time that you heard Don yelling?

A. Standing - - sometimes he would look there where my mama was and sometimes look in the bedroom, so he kept going back and forth.

Q. But he wasn't in the front living room?

A. No.

Q. You also said something about one of the men having a knife; is that right?

A. Right.

Q. Which of the men had the knife?

A. The one with the jerri curl.

Q. And did you actually see the man with the jerri curl get the knife?

A. Right.

Q. When did you see that take place?

A. Right when he came in the door.

Q. Did he come in the door after the man with the Afro came in and told you to be quiet?

A. They all came in the door at the same time, but they scattered out. One - - two were in the front room and one went and looked in the bathroom and then came in there where we were, me and my brother was.

Q. All right. That's the man that you've said is the tall man with the Afro; is that right?

A. Right.

Q. When the man with the jerri curl got the knife from the kitchen, was that before or after you heard Don yelling?

A. Before.

Q. What kind of clothes did the man with the jerri curl have on?

A. I can't remember him.

Q. You can't remember him?

A. I can remember his jerri curl, but I can 't remember the clothes he was wearing.

Q. Do you remember the clothes that he was wearing earlier in the evening, when he was over at Bam's house?

A. Yes.

Q. What - -

A. He had on jeans - - I can't remember his shoes, but he had on jeans and a short-sleeved white shirt.

Q. And if I understand you correctly, these three men were over at Bam's house the whole time that you were over at Bam's house; is that right?

A. Right.

Q. The man that had the jerri curl and the jeans and the white shirt, are you sure that he changed clothes when he came over to your house?

A. I'm not sure about him, but I think the other two, they did change their clothes.

Q. Do you remember whether or not the man with the jerri curl had on gloves when he came over to your house?

A. Yes, he had on gloves.

Q. What kind of gloves did he have on?

A. Black. Two had on black, and one had on yellow.

Q. And it's A.J. that had the yellow gloves.

A. Right.

Q. When you heard Don yelling and then this sound that you heard, could you see where your mom was and see the other man that was in the house earlier with your mom?

A. No.

Q. Were you able to see from the bedroom this side living room?

A. Yes.

Q. And your mom and the other men were not in that room?

A. Huh-uh, no.

Q. Yes or No?

A. No.

Q. What's the next thing that you saw or heard after you heard Don telling and then what you think was his throat being cut?

A. I heard a gun.

Q. You heard a gun?

A. Yeah. But not - - it didn't go off. It - - it sounded like it hit somewhere.

Q. How do you know it was a gun?

A. Because A.J. was carrying a gun in his jacket, he had it inside his jacket, a pocket in the jacket (indicating).

Q. You saw him carrying a gun while he was at your house?

A. Right.

Q. What did the gun look like?

A. Brown.

Q. The whole gun was brown?

A. No, just the handle.

Q. The handle.

A. And the other part of it was black.

Q. You told me earlier that you had seen one of the men with a gun when they were at Bam's house; is that right?

A. Yes. Two of them.

Q. Two of them?

A. Right.

Q. Which of the men had guns when they were at Bam's house?

A. The one with the curl, and his gun was silver. And A.J. was using the other-guy-with-the-Afro's gun, which was silver, and the guy with the Afro took A.J.'s gun and put it in his pocket of this coat, his jacket pocket.

Q. How did you know that the gun that A.J. was using at Bam's house belonged to the man with the Afro?

A. Repeat that over.

Q. Sure. You told me that when these men were at Bam's house, two of the men had guns, right?

A. Right.

Q. And you told me that the man with the jerri curl, when he

was at Bam's, he had a silver gun; is that right?

A. Right.

Q. Now, which of the other two men had a gun, or did they both have guns when they were at Bam's?

A. They both did.

Q. You're telling me now that all three of the men had guns at Bam's?

A. Not all of them were carrying them. All of them were carrying them, but not in the way - - because the guy that had the Afro went into the car and put the gun away.

Q. When did he do that?

A. Right when the guy gave A.J. his gun and A.J. have him his gun to put in the car.

Q. This all took place at Bam's house?

A. Right.

Q. You told me that A.J. gave to the man with the Afro the gun that A.J. had?

A. Right.

Q. And the man with the Afro took the gun A.J. had given him to the car?

A. Right.

Q. What was this car like?

A. It was a green car.

Q. Do you know what kind of car?

A. No.

Q. Then the man with the Afro gave A.J. a gun; is that right?

A. Right.

Q. This was at Bam's?

A. Right.

Q. What kind of gun did the man with the Afro give to A.J. at Bam's?

A. It was a silver gun.

Q. The gun that A.J. have to the man with the Afro - -

A. Right.

Q. - - what kind of gun was that?

A. It was a brown.

Q. Do you mean brown-handled gun?

A. Right.

Q. Just a few more minutes. You're doing a terrific job.

Could you tell whether or not the gun that A.J. had when he was over at your house was the same gun with the brown handle that the man with the Afro had given to him over at Bam's house?

A. Yes, it was.

Q. It looked like the same gun to you?

A. Yes.

Q. Did any of the other men have a gun when they were over at your house later that night?

A. No.

Q. The only gun that you saw was this one with the brown handle?

A. Right.

Q. And A.J. had it?

A. Right.

Q. Did you see any of the other men with the knife other than the man with the jerri curl?

A. There was only one. It was the one with the jerri curl.

Q. The other two men didn't have knives?

A. No.

Q. And this question started when you were telling me about you heard a noise like a gun, right?

A. Right.

Q. And I was asking you how you knew it was a gun, this noise that you heard. How did you know it was a gun?

A. Because when - - after the accident happened, I was going in there to cut on the lights, and then the guy that was with my mom and Don asked - - I got up, and I thought it was one of the robbers. I was about to yell, but I didn't. And then he said, Cut back off the lights. And I said, What happened to you? And he said, The fat, chubby one hit me with a gun.

Q. So that's how you knew - -

A. Knew - -

Q. - - later on that it was a gun?

A. And then before. Because you can tell the way someone hits anything else by the way you hit them with a gun.

Q. Could you tell where this man got hit with the gun?

A. About right here (indicating) where A.J. was hitting me with his fist.

Q. After you heard this man get hit with the gun, what was the next thing that happened?

A. They all came in the room where me and my brother was.

Q. What happened when all three men came into the room where you and your brother, Raymond, were?

A. They tied us up, and then they went in - - the one with the jerri curl asked to let him have the knife.

So he went in the room where my mom was, and a few seconds later I heard my mom screaming. And then they all came in the room. And then they said, Let's go.

Q. All right. Now, first, all three of the men came into the

room together?

A. Right.

Q. And you say that they tied you and your brother up; is that right?

A. Right.

Q. Did all three of the men do that?

A. No.

Q. Who tied you up?

A. Only two.

Q. Which two?

A. A.J. and the tall one.

Q. With the Afro?

A. Right.

Q. What was the man with the curl doing while you and Raymond were being tied up by A.J. and the man with the Afro?

A. He was in there tying my mother up.

Q. How do you know he was tying your mother up?

A. Because after - - you know, after he sliced my mom's neck, he - - then they all - - then he came back in the room. And then the tall one with the Afro left and drug my mother into me and

Raymond's playroom and threw her down by the TV and cut the TV up real loud.

Q. But at the time you were being tied up, you and Raymond, were you able to see what the man with the jerri curl was doing?

A. No.

Q. All you knew is he left the room; is that right?

A. Right.

Q. And then after you were tied up by A.J. and the man with the Afro, what's the next thing that happened?

A. I could hear my mom scream.

Q. You said something to me about the man with the curl asked for a knife.

A. Yeah, from A.J.

Q. Did A.J. have the knife when he was tying you and Raymond up?

A. Yes, because he was cutting - - he was cutting the wire.

Q. And the man with the jerri curl came in and asked for the knife?

A. Right.

Q. And what happened after he asked for the knife?

A. He went in the room. Then a few seconds later you could

- - we heard my mother scream.

Q. The man with the jerri curl got the knife from A.J.; is that right?

A. Right.

Q. Do you know what room that he went into?

A. Yes. The front living room.

Q. Front living room?

A. Right.

Q. Is that where you heard your mother scream from?

A. Right.

Q. Could you see your mother in the front living room from where you were in the bedroom?

A. No.

Q. But you, from her screams, could tell that she was up in the living room, in the front?

A. Yes, because if you could - - if she was in the other living room on the side where there was a doorway, you can hear even louder.

Q. Plus you could have seen her then, too, couldn't you?

A. Right.

Q. When the men tied you up, did they put anything over your

eyes?

A. No.

Q. Did they put anything over your mouth?

A. Yes.

Q. What was that?

A. Tape.

Q. When you heard your mother scream, did she say anything?

A. No.

Q. What was the next thing that happened after you heard your mother scream?

A. The man with the jerri curl came back in the room. And then the one with the Afro went back in the room where my mother was and drug her in to me and Raymond's room.

Q. When you heard your mother scream, was the man with the Afro and A.J. still in the bedroom with you and Raymond?

A. Yes.

Q. They were there?

A. Right.

Q. You saw the man with the Afro drag you mother where?

A. Into our playroom.

Q. Where is the playroom?

A. Right across the hall.

Q. Across the hall from your mom's bedroom?

A. Right.

Q. What color room is that?

A. It was - - it had pink walls.

Q. And after the man with the Afro drug your mother into the playroom, what was the next thing that happened?

A. They cut up the TV real loud.

Q. Who cut up the TV?

A. The man with the Afro.

Q. And this television was located where?

A. In the playroom.

Q. Where your mother was?

A. Right.

Q. What happened after the man with the Afro turned the television up loud?

A. I was - - I started to cry a little. And then A.J. came over there and told me to be quiet, and I kept crying, so he kept hitting me, four times.

Q. A.J. hit you four times?

A. Right.

Q. What did he hit you with?

A. The side of the head.

Q. Did he hit you with anything?

A. The - - his fist.

Q. His fist. And you remember it was four times?

A. Right.

Q. And what was the man with the Afro and the man with the jerri curl doing while A.J. was hitting you in the side of the head?

A. I don't know.

Q. Were they in the room?

A. Yes.

Q. What happened after A.J. hit you on the side of the head?

A. I was knocked unconscious, but right - - I could - - I wasn't unconscious for a long time. But they were doing something else while I was knocked out a little bit. And then - - then I could hear them say, Let's go.

Q. Do you know what they were doing, Deonta, while you were unconscious?

A. No.

Q. So you woke up or became conscious –

A. Right. Became conscious. And I could hear them say, Let's go. But they had a flat on the car, because you could - - because the wheel was flat because there was the glass at the side of the street where the curb was.

Q. How did you know they had a flat?

A. Because they were still out there fixing the car when me and my brother were trying to get loose.

And then when me and my brother got loose, I ran in there to see if they were still there. I hopped on the couch, looked out the window. And then you could still see them - - A.J. - - they was telling him, Hurry up, get the tire in the trunk. And so then he put the jackhammer and the tire in the back of the trunk, and they just pulled off.

Q. Did you see the car that they were in?

A. Yes.

Q. Could you describe it for me?

A. It was that same green car.

Q. You say you saw these three men through the window?

A. Right.

Q. Which window was that you were looking out?

A. The front room window, right there - - there was a couch right there by the window.

Q. Now, the window that you looked out, does that look out onto Prospect or does it look out onto 42nd Street?

A. Prospect.

Q. And where was this green car that you saw?

A. it was right there along the curb. ^***
(Nothing about Datsun, I guess.)

Q. Along the curb where?

A. By the corner, right - - they were about to start pulling of, and they didn't quite have the tire and the jackhammer in the trunk.

Q. You say the car was near the corner?

A. Right.

Q. Was the car parked on 42nd Street or on Prospect?

A. You can see Prospect and 42nd Street.

Q. Okay. But which street was the car parked alongside? Do you know what I mean by that question?

A. On the right, right there (indicating). They wasn't parked up where the traffic was, that part, when you can come down the street.

Q. Do you know how Prospect runs from going downtown to out south?

A. Uh-huh - - yes.

Q. And 42nd runs across Prospect; is that right?

A. Right.

Q. Kind of like a T, like (indicating), right?

A. Right.

Q. What I wanted to know was whether or not the car was parked on Prospect or whether it was parked on 42nd Street.

A. Prospect.

Q. And was the front of the car facing towards downtown or was it facing towards Grandview?

A. I don't really know.

Q. You say that you saw A.J.; is that right?

A. Right.

Q. Outside, near the car?

A. Right.

Q. What was he doing?

A. He was - - he was putting the nuts back on the car.

Q. Did you see the other two men?

A. No. They were already in.

Q. Could you see them inside the car?

A. No.

Q. You told me, though, that the car had already started moving?

A. Yes, when - - they - - A.J. told them to start the car and start pulling off a little, and so he - - he already had the tire in it, but he didn't have it in all the way. And he didn't have the jackhammer in all the way. So he pushed that in and shut the hood, and then he went in and got in.

Q. When you say the "hood," do you mean the trunk of the car?

A. Yeah, the trunk.

Q. Do you know what I mean, the difference between the front of the car where the engine is and the trunk?

A. Yes.

Q. Where did he put the jack?

A. The trunk.

Q. Which part of the car did A.J. get in, the driver's side or the passenger's side?

A. The passenger's.

Q. Now, you weren't able to see the men in the car, right?

A. Right.

Q. So you don't know if there was just one man or two other men in the car, do you?

A. Yeah, you could tell. because the one with the curl told A.J. to hurry up, and you can see - - you could see the first one pulling off, you could see the one with the Afro.

Q. Where could you see the man with the Afro?

A. He was in the driver's seat.

Q. But were you able to see the man with the curl?

A. No.

Q. But you heard him?

A. But you could hear him.

Q. Where was he from where you could hear?

A. He was in the back seat.

Q. Did you, during the time these men were at the house, did you hear all of the men talk?

A. Yes.

Q. Did they sound any different than when they were at Bam's house?

A. No.

Q. Did any of the men sound - - talk funny, like Jamaicans?

A. Yes.

Q. Which of the men did?

A. A.J.

Q. What about the other two men?

A. I don't think - - I don't know about the one with the Afro, but the one with the curl, he didn't talk Jamaican.

Q. He talked - -

A. Regular.

Q. - - regular?

A. But in the accident, he tried to talk Jamaican, but when he asked for the knife he didn't talk like - - talk Jamaican.

Q. I thought you told me the man with the curl was the one that asked for the knife.

A. He did, he asked for the knife.

Q. Are you telling me that the man with the curl tried to talk Jamaican?

A. Right.

Q. Not the man with the Afro?

A. Right.

Q. I don't want to confuse you. Let's just make sure we're clear. You're not sure about the man with the Afro whether or not he's Jamaican or not; is that right?

A. Right.

Q. But you're telling me that the man with the curl pretended to talk like the Jamaican?

A. Right.

Q. But you could tell that he wasn't?

A. Yes.

Q. And you're sure that these three men that were in the house and did the stabbing of your mom and Don Wright are the three men that were at Bam's earlier in the evening?

A. Right.

Q. The same night?

A. Right.

Q. I only have a couple more questions for you, and then I'll let you go home, okay?

A. Okay.

Q. When you came over to the house, you and Raymond, after you left Bam's, and you came home, did you see Don or your mom or this other man smoking anything - -

A. No.

Q. - - or doing any kind of drugs?

A. No.

Q. How long did you know Don Wright?

A. Since I was small.

Q. Do you know whether he was engaged in this business of selling drugs like your Uncle Bam was?

A. No.

Q. Do you know what I mean by that?

A. Yes.

Q. When the men were going around your house that night, did you hear any of them asking about drugs?

A. Yes. The one with the curl was trying to ask them how - - where is the money and where does - - where doe he have any of that cocaine.

Q. Was there any cocaine kept in that house, as far as you know?

A. No.

Q. Do you remember talking to a police officer about what happened next - - oh, I guess it would have been a few days afterwards?

A. Yes.

Q. Almost a week after. Do you remember that?

A. Yes.

Q. And he showed you some pictures?

A. Yes.

Q. Did you pick out anybody?

A. Yes.

Q. Who did you pick out?

A. A.J.

Q. Did you pick - -

A. He looked like him.

Q. Did you pick a guy that looked like A.J.?

A. Yes.

Q. Did you pick anybody else out?

A. No.

Q. Did you have a chance to look at those pictures real well?

A. No.

Q. You didn't have a good chance to look at them?

A. Not real, real well, but I got to look at them.

Q. Let me ask you, Deonta - - I know it's been a long time since you've seen those pictures, but are you sure that none of the other men in the pictures was a man that was at your house that night?

A. I don't know.

Q. You don't know?

A. Huh-uh.

Q. You told me that the tall man with the Afro, he didn't have beard or a mustache; is that right?

A. He didn't then.

Q. He didn't then?

A. Yes.

Q. What do you mean by that?

A. He didn't have one when the accident happened, he didn't have a mustache or a bread.

Q. Do you know if he has one now?

A. I don't know.

Q. What about the other two men, A.J. and the man with the jerri curl?

A. A.J. had a beard, a little beard, and he had a mustache.

Q. What about the man with the jerri curl, did he have a beard or a mustache?

A. No.

Q. Do you know how old these men were?

A. The one with the jerri curl looked like he was about 21. I don't know about the rest.

Q. And you'd never seen the man with the jerri curl before this

night?

A. No.

Q. The green car that you saw, was it a big car or a little car?

A. Big.

Q. Do you know how many doors it had?

A. Four.

Q. You don't know what kind of car it is?

A. No.

Q. Is that because you don't remember or is it some kind of strange car?

A. It was strange, and it - - it was sort of raggedy, almost like.

Q. Kind of beat up?

A. Yes.

Q. Could you tell how - - was it a old car or a new car?

A. Old.

Q. I don't know if you got a chance to see the license plate. Did you?

A. No.

Q. Did you see the men drive off?

A. Yes.

Q. Which direction did they go?

A. They went - - they went straight, and then they took a left.

Q. Straight towards where?

A. They took - - they went straight, from our block they went straight down (indicating), and then they took a left (indicating).

Q. Before they took the left, were they going towards downtown or away from downtown?

A. Downtown.

Q. Towards downtown?

A. Yes.

Q. And then thy took a left going towards the Paseo?

A. Right.

Q. Have you seen any of these men since the - - what you call the accident?

A. No, I haven't.

MR. BERRIGAN: Thank you very much, Deonta. I don't have any more questions. Mr. H[illegible] might want to ask you some questions.

MR. HALL: Deonta, thank you very much for coming in today.

THE REPORTER: Are you waiving signature on this deposition?

MR. HALL: Yes.

THE REPORTER: Are you ordering copies of the transcripts, Mr. Hall?

MR. HALL: Yes.

(The witness was excused.)

IN THE CIRCUIT COURT OF JACKSON COUNTY
MISSOURI
AT KANSAS CITY

STATE OF MISSOURI,	)	CR87-1997
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
	)	
ROGER BUCKNER,	)	Sept. 15, 1988
	)	
Defendant.	)	

THE DEPOSITION OF THE WITNESS
RAYMOND KINNEY

produced, sworn and examined, between the hours of 8 a.m. and 6 p.m. of September 15, 1988, at the Office of the Public Defender, 10th Floor Jackson County Courthouse, 415 East 12th Street, Kansas City, Jackson County, Missouri, before

PHYLLIS M MAIER, CSR
Registered Professional Reporter

a notary public in and for the State of Missouri, in the above-entitled cause; taken on behalf of the defendant.

APPEARANCES

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I N D E X

Witness: RAYMOND KINNEY Page:

Direct Examination by MS. SCHENKENBERG 3

E X H I B I T S

(None Marked)

- - - - - - - -

TRANSCRIPT COPY

MR. HALL MS. SCHENKENBERG

- - - - - - - -

SIGNATURE

The witness's signature to his deposition is waived.

RAYMOND KINNEY

a minor, being produced, sworn and examined on behalf of the defendant, testified as follows:

DIRECT EXAMINATION

BY MS. SCHENKENBERG:

Q. Raymond, as Mr. Hall has just told you, my name is Barbara Schenkenberg, and I'm a lawyer, and I'm going to be asking you some questions here today. Okay?

A. Okay.

Q. I'm sure Mr. Hall has talked to you some about what's going to happen, but I'm going to go over it again.

First of all, I can see you're real interested in this machine right here (indicating), and what's going on is Ms. Maier here has the ability, she can actually write down everything that's said just while we're saying it, and then she's going to type it all up so we can read it later. Okay?

A. Okay.

Q. And what that means is that whenever I ask you a question or you would ask me a question, we'd have to answer out loud so she could write it down, because she couldn't write down like if you shrugged your shoulders or shake your head or something like that. Okay?

A. Okay.

Q. So you promise that you'll answer everything out loud?

A. Yes.

Q. Let me say a few things to you before we get started here. I know this is hard for you to answer a lot of questions like this, and it happened some time ago. There aren't any right or wrong answers here. This isn't like a test in school or anything. All we want to know is what you remember about

what happened that night that your mama got hurt. Okay?

A. Okay.

Q. And sometimes if I ask you a question you don't understand, or if you want some more information or you have a question you want to ask me, you just feel like you can do that. Okay?

A. Okay.

Q. Although this looks kind of formal and I know you're in a strange place, you shouldn't be nervous and shouldn't worry about saying the wrong thing. Okay?

A. Okay.

Q. A little hesitant there, but I think we'll get better.

And do you promise me that if you don't understand a question that you'll tell me that rather than try to make up an answer or just go ahead and not understand it? Do you promise you'll tell me if you don't understand any questions?

A. Yeah.

Q. Now, we have to do a silly thing first. I have to ask you for the record, so Phyllis, here, can write it down, what your name is.

A. Raymond Kinney.

Q. How old are you, Raymond?

A. Nine.

Q. What school do you go to?

A. Warford Elementary.

Q. What grade are you in?

A. Fourth.

Q. Do you know what your teacher's name is?

A. Miss Shippee.

Q. Does she teach all the time or do you have different teachers?

A. She teaches me all the time.

Q. How many kids are in your class?

A. 27, I think.

Q. What's your favorite subject in school?

A. PE.

Q. Who is your best friend there in school?

A. Fred - - Fred - - I don't know his last name.

Q. Do you and Fred play around together?

A. Yeah.

Q. What's your favorite thing that you do with Fred?

A. Play kickball.

Q. Before we get started, do you have any questions for me?

A. No.

Q. You remember the night that your mama got hurt and Don Wright got hurt and his friend got hurt?

A. Yes.

Q. And you've talked to Mr. Hall about that?

A. Yeah.

Q. That was last night, and maybe a little bit today?

A. What do you mean by that?

Q. Did you talk to him last night about it?

A. Yes.

Q. Do you remember quite some time ago talking to the police about it?

A. Yes.

Q. Going down to the police station down here (indicating)?

A. Yes.

Q. Now, do you remember what day of the week it was that this happened?

A. No.

Q. Do you remember whether you went to school that day?

A. Yes.

Q. So it was a school day. At least we know that much, hmm?

A. Yeah.

Q. What school were you going to then?

A. It was called Kumpf.

Q. Huff?

A. Kumpf.

Q. Kumpf. Okay. Now, your brother, is he in the same grade as you or older?

A. He's older.

Q. Is he a year - - a grade older than you?

A. Yeah.

Q. When you got out of school that day, who picked you up from school?

A. Nobody. I walked over to my uncle's.

Q. So you walked alone to your uncle's?

A. No, with my brother.

Q. What's your brother's name?

A. Deonta Kinney.

Q. Do you have any other brothers and sisters?

A. No.

Q. So when you got out of school, you and Deonta walked over to your uncle's house?

A. Yes.

Q. Do you know what your uncle's whole name is?

A. (The witness nodded.)

Q. Who's that?

A. Bam Kinney.

Q. How far was it from your school to your uncle's house?

A. Just a block away.

Q. Do you remember where your uncle was living then?

A. Yes.

Q. Where was that?

A. He was living around the corner from the school.

Q. Do you know the address?

A. No.

Q. Do you have any idea - - what time did you get out of school that day?

A. I don't know that.

Q. Was it regular time? You didn't get out early or late?

A. One time we got out early.

Q. But unless I tell you difference, all my questions are going to be about this particular day, this day. Okay?

A. (The witness nodded.)

Q. On this day, do you remember whether you got out early or late?

A. We didn't get out early.

Q. So it was probably regular time?

A. Yes.

Q. Who was at your uncle's house when you got there?

A. There was just him, his wife, and his two children. That's it.

Q. So that would be your Uncle Bam and his wife and her two children?

A. Yes.

Q. Do you know your Uncle Bam's wife's name?

A. Gwen.

Q. Gwen. Do you know her last name?

A. No.

Q. Do you know her kids' names?

A. I know one of them.

Q. What's that?

A. The boy's is Ronnie.

Q. Are they about your age or were they younger or older?

A. Younger.

Q. A lot younger?

A. Yeah.

Q. Too young to play with, really?

A. No.

Q. When you got to your Uncle Bam's house, what did you do?

A. We went up to the park, and I played with my brother. And then Ronnie came up and so we started playing with him, and then we started playing in the sand.

Then it was nighttime, so we went back home. We went back down to Bam's.

Q. Let me stop you for just a second. How is it that you knew to go to Uncle Bam's house?

A. Our mom told us to go there in the morning.

Q. Before you left for school, she said - -

A. Yeah.

Q. - -Kids, go, after school, to Uncle Bam's house?

A. Yeah.

Q. When you got there, your mom wasn't there, though?

A. No.

Q. And neither was Don Wright?

A. No.

Q. And so it was still light, wasn't it, when you got to Uncle Bam's house?

A. Yes.

Q. So you went up to the park and played around until about dark-time?

A. Yeah.

Q. And then you went back to Uncle Bam's house?

A. Yeah.

Q. Then what did you do?

Let me give you a different question. When you got to Uncle Bam's house, who was there, when you got back from

the park?

A. There was - - our mom was there, and this man and his lady was there. They had a big bag of white powder, and they were selling it to these other people, but I didn't know them.

Q. Was Don Wright there?

A. No. He was coming there, looking for my mom.

Q. Did you know the man that was there, the man and the lady that were there with your mom?

A. No.

Q. Was it the same man who later went home with you or was it somebody different?

A. Somebody different.

Q. And did you go home from playing in the park just about the time it got dark or later or- -

A. About the time- -when it was about to turn dark.

Q. So you didn't stay in the park a long time after it got dark?

A. No.

Q. What did you do when you got back to Uncle Bam's house?

A. We watched TV and just played around, really.

Q. Was Uncle Bam's wife's mother there? Do you know

Dorothy, was she there?

A. No, she was at her house. She lives next- - right next to Bam.

Q. And was it your mom who was selling this white powder?

A. (No response.)

Q. Was she selling it with these other folks, or you said they were selling it, so- -

A. No, they were selling it.

Q. Had you ever seen these other people before?

A. No.

Q. Did you have dinner at all?

A. Huh-uh.

Q. Is that a No?

A. No.

Q. What happened after- -can you tell me, go on, then. So you're watching TV, and then what' s the next thing you remember happening?

A. Our mom came in. And then she was asking where were Deonta and Raymond. So we came, and they said, Come on, we're going home. And then we were about to go home.

Then we stayed there for a little bit. And then Don came

and said, Where is Mickey? And then Bam went to the door, and he said, She's not here. And he said, I know she's in there. And she just walked out the door and said, Come on, guys. So we walked up the street, and Don follows us.

And then we got home- -

Q. Who said, Where is Mickey?

A. Don.

Q. Do you know who Mickey is?

A. Yeah. She's my mom.

Q. Oh, that's what he calls your mom?

A. (The witness nodded.)

Q. You said that you heard Don say, I know she's in there?

A. Yeah.

Q. Was Don having some trouble - - did Bam not want him to come in?

A. Yeah.

Q. Bam didn't want him to come in?

A. Yeah, he didn't want her to come in.

Q. He didn't want Don to come in?

A. Yeah.

Q. Did Don come inside of Bam's house?

A. No - - our mom went out.

Q. While you were watching TV, before Don came to Bam's house, did anybody else come to Bam's house?

A. Yeah, some people buying the powder.

Q. Were they any people that you knew?

A. No.

Q. Were any of those people the same people that ended up going home with you?

A. No, they didn't go home.

Q. Who was going to the door when these people would come to buy power?

A. Bam.

No, what do you mean by coming to the door?

Q. Who would answer the door, like if somebody knocked at the door, then who would go to the door?

A. Bam.

Q. And then these people would come in, and did they talk to Bam or your mother?

A. They would talk to Bam.

Q. And then what would happen?

A. And then the guy with the powder was selling some.

Q. So there was somebody else there with powder?

A. Yeah.

Q. Is this that man you were talking about a little while ago?

A. Yeah.

Q. And you don't know his name?

A. Huh-uh - - no.

Q. Do you remember what he looked like?

A. No.

Q. Was he tall, short, heavy, dark?

A. Kind of dark.

Q. Did he talk with an accent of any kind?

A. I can't remember that.

Q. Do you know a man named Ernest Black?

A. No.

Q. Later on, did you go home and did some people go home with you and your mom and Don?

A. No.

Q. Besides the people that came to buy the powder, did

anybody else come to Bam's house?

A. No. Just one person, yeah.

Q. Who was that?

A. That was Gwen's mother.

Q. Did she come there?

A. Yeah.

Q. Did she stay there?

A. Yeah, for a little while.

Q. When you left Bam's house, did you drive or walk?

A. Walk.

Q. Where did you walk to?

A. Back to our house.

Q. Who all walked back to your house?

A. Just Don, my mom, Deonta, and me.

Q. And no one else was with you?

A. No.

Q. Do you have any idea how long you were there watching TV before you went home?

A. No.

Q. Did you watch a couple of shows?

A. A couple of shows.

Q. Do you remember whether those were long, maybe detective or cowboy shows, or were they short comedy- - shows where they made a lot of jokes?

A. Comedy shows.

Q. So you watched a couple of those kind of shows?

A. Yeah.

Q. Could you have watched maybe three or four of those kind of shows?

A. No. We only stayed there and watched two.

Q. And then you went home, to your house?

A. Yeah.

Q. Do you remember where you were living then?

A. You mean the address and all?

Q. Yes.

A. No.

Q. Let me ask you - - and don't think that you're doing anything wrong, but I'm going to ask you a question. What's your address now where you're living?

A. 1108 - - I don't really know. I don't look at it all the time.

Q. Is it in Kansas City?

A. Yeah.

Q. It is in Grandview, by any chance?

A. Yeah, you could say that.

Q. Do you know what city you live in?

If you don't know, that's okay, too.

A. I don't know.

Q. So after you walked back to 4201 Prospect, where you were living then, did you go straight home from Bam 's house?

A. Go straight home to about Bam's house?

Q. Did you walk straight from Bam's house to your house with your mother?

A. Yeah.

Q. Did you stop anywhere and eat or have anything to drink?

A. No.

Q. What did you do when you got back to your house?

A. I did my homework. Then I watched TV. And then our mom told us to go to bed.

Q. Who all was there while you were doing your homework and watching TV?

A. Watching TV - - just us four.

Q. Now, back at - - I hate to do this to you. I forgot to ask you a question, though. I' ll let you think about it for a second.

Back at Bam's house, did you see anybody smoking anything out of a pipe?

A. Yeah.

Q. Who was that?

A. It was a lady, and the one man that was selling it.

Q. Who was the woman that was selling it?

A. I don't know her.

Q. Was it Bam's wife?

A. No.

Q. Was it Dorothy, Bam's wife's mother?

A. No.

Q. Did you see anybody else smoke anything out of a pipe?

A. No. Just them - - no - - yeah. There was two more people, but I don't know them either. They were there just smoking and all that around this one table.

Q. Did you see anybody else?

A. No. Just the people that were selling it.

Q. Did you ever see your mother smoke anything out of a pipe?

A. Yes.

Q. And was that at Uncle Bam's house?

A. Yeah.

Q. Did you see your Uncle Bam smoke anything out of a pipe?

A. Yes.

Q. And what you're telling us is that Don never came in Uncle Bam's house?

A. Huh-uh.

Q. So this may sound sill, but did you see him smoke anything out of a pipe at Uncle Bam's house?

A. No, he never did come in most of the time. He never did want to come in.

Q. That day, you mean?

A. Yeah.

Q. So now let's jump forward a second. So then you went on home and you were home doing your homework and watching TV and stuff, and you say it was just you and your

mom and Deonta and Don Wright there at your house; is that right?

A. Yes.

Q. And after you did your homework and watched TV, then what happened?

A. Our mom told us to go to bed.

Q. Did you see your mom smoking anything out of a pipe or smoking a pipe of any kind when you were at your house?

A. No. She was watching TV, too.

Q. How about Don, did you see him smoking a pipe or anything out of a pipe at your house?

A. Yeah. He was in the frontroom.

Q. And he was doing that in the frontroom?

A. Yeah.

Q. Was anyone with him when he was doing that?

A. No. Just him.

Q. You look like you were going to add something. Were you going to - -

A. No.

Q. So then you watched TV, and then your mom says It's time to go to bed. Do you have any idea what time - - well, what time was your usual bedtime then or did you have a usual

bedtime.

A. Yeah. It was around 9 o'clock.

Q. Was it your usual bedtime or was it later that you went to bed that night.

A. It was our usual.

Q. Do you have any idea what TV show you were watching before you went to bed?

A. No.

Q. Then your mom says, Go to bed, and so what did you do?

A. Went to bed.

Q. Which room were you sleeping in?

A. The one between the playroom and the bathroom.

Q. Was your bedroom close to the front of the house or the back of the house?

A. The front.

Q. And did it have a door that led into the frontroom?

A. Yeah.

Q. And then a door that led into what, the kitchen or the other bedroom?

A. The other frontroom. We have two frontrooms.

Q. So you went to bed. And you and Deonta slept in the same room?

A. Yeah.

Q. Am I saying his name right? Say your brother's name?

A. Deonta (de-on-tay).

Q. Did you go right to sleep or were you up for a while, playing around?

A. We went right to sleep.

Q. When you went to bed, was there any light on in your bedroom?

A. No.

Q. Was there any light on in the frontroom where Don was?

A. Yeah.

Q. And were you watching TV like in that - - the middle room, the room that led into the kitchen, or were you watching TV in the frontroom that led to the porch?

A. (Shaking head) the playroom.

Q. Where was the playroom, can you tell me where that was, which room you're calling the playroom?

A. Yeah, it was - - it was way in the back, and it had - - it was right next to the bathroom.

Q. So you went to bed, and you say you went right to sleep?

A. Yeah.

Q. When you went to bed, who was at your house?

A. Just us four.

Q. Just your mom and Don Wright and you and Deonta? -- is that right?

A. Yeah.

Q. After you left your Uncle Bam's and you went on home, while you were there watching TV and doing your homework did anybody come over to your house?

A. No.

Wait a minute. Just one person. It was a man, and a lady.

Q. Do you know who this man and lady were?

A. No.

Q. So they came over to your house. And did they stay or leave?

A. The lady left. The man took her back home. Then he came back.

Q. So he stayed there at your house?

A. Yeah.

Q. So he was still there, then, when you went to bed?

A. What do you mean by that?

Q. What?

A. What do you mean by that?

Q. Well, did you wake up during the night?

A. Yeah.

Q. And what was it that woke you up?

A. It was a loud boom on the floor.

Q. Could you tell where this came from?

A. It had to come from in the living room.

Q. Just so Phyllis can write it down here, what is your mother's name?

A. Carol Kinney.

Q. And what's Don's full name? - - do you know his whole name? Was it Don Wright.

A. Yeah.

Q. Do you remember what Don was wearing that night?

A. No.

Q. Do you remember what your mom was wearing that night?

A. No. Yeah, she was - - she changed into her robe. It was a red robe.

Q. Rat or red?

A. Red.

Q. R-e-d - -

A. Uh-huh.

Q. - - as in a color - - like this color (indicating)?

A. Yes.

Q. While you were at your house, before you went to bed, did anybody come over there to buy some powder?

A. No.

Q. Do you know why this man and the lady came over?

A. No.

Q. Did you hear any talk between the man and the lady and your mom or Don? Did you hear anything anybody said?

A. No, not really. I can't remember.

Q. When this man and lady came, did they go and sit with Don or did your mom leave you and go sit with them or what happened?

A. Can you say that over again?

Q. You said a man and lady came to your house while you

were there watching TV and doing your homework: is that right?

A. Yes.

Q. Because I don't want to put words in your mouth or anything. You remember that happening?

A. Yeah.

Q. Just sort of?

A. Yes, sort of.

Q. When this man and lady came, do you remember, did they come watch TV with you or what did they do?

A. They didn't come to watch TV with us.

Q. Do you remember what they did?

A. Yeah, they were just - - they went in the living room.

Q. And who was in the living room when they went in there?

A. It was Don, my mom, the man, and the lady.

Q. Do you remember what the man was wearing?

A. Yeah. He was all black.

Q. All black?

A. (The witness nodded.)

Q Do you remember what the lady was wearing?

A. No.

Q. And you say you'd never seen them before?

A. No, I didn't see them.

Q. And it was just those two people? Did anybody else come to your house?

A. Just those two people.

Q. So then you went to bed, and you say that you heard a big bank later on in the night; is that right?

A. Yes.

Q. And then what did you do?

A. Then I just started looking at that one guy with the Afro, he - - he was just staring at me then, because he thought I was asleep, and then he put his hand in the lamp that didn't have no light - - light bulb. And then I just watched - - just kept on looking at him.

And then I - - he left, and then when - - this man came in there with his gloves on and threw my mom on the couch, and then he left.

Then the one guy came back.

Q. The guy with the Afro?

A. Yeah. He came back, and he started going back and forth, back and forth.

Q. Back and forth between the rooms?

A. Yeah. And then Don - -

Q. Is this the man with the Afro or the man with the gloves?

A. The man with the Afro.

And one guy - - no, Don, he was in there hollering. Then I just heard somebody drop to the floor. And then I - - then I saw the one guy, the big chubby guy, take my mom - - the one with the gloves on - - take my mom and throw her against the TV.

Q. Let me stop you for just a second. Does the big chubby guy, does he have an Afro, or is this the third person?

A. This is the second person I was talking about, the one with the gloves.

Q. Let's stop for a second, and let me just ask you a couple of questions about what you just told me.

So you woke up, and you say when you woke up, was there someone in your room?

A. Yeah.

Q. And this man had an Afro?

A. Yes.

Q. Do you remember what kind of clothes he was wearing?

A. (Shaking head) I know that he was wearing a jacket, but I couldn't see what color it was.

Q. Did he have gloves on?

A. No.

Q. Did he have a hat on?

A. No.

Q. Did he say anything to you then?

A. No, not until he tied us up.
Q. And then he - - you say he left?

A. Yeah.

Q. And what did you do then?

A. Then - - wait a minute. I made a mistake.

Before I saw that man pick up my mom, I woke Deonta up. And then the one - - I said, Deonta, wake up, and he woke up and he said, What? And I said, Something's happening. And then he said, Big deal. And then he said - - and then he woke back up and said, Something's happening? And then he looked at me, and then this one guy came in and he saw that he picked up my mom and threw her against the TV, and then he started crying. And then the man came in and he hit him across his head.

Q. Deonta?

A. Yeah.

Q. Was you mom in the room at that time?

A. In the room that we were in?

Q. Yes.

A. No.

Q. When he threw her against the TV, was she already tied up or not?

A. She wasn't tied up - - yeah, she was tied up.

Q. Had you gone to the door and looked out of the door yet?

A. Huh-uh.

Q. So, then, after this happened, and then - - did the man leave or stay there? - -leave the room, I mean.

A. Which one?

Q. The guy with the Afro.

A. No. He wasn't there.

Q. Okay.

A. Then he came back with some rope and some towels. Then he tied us up and put something in our mouth.

Q. Let me stop you for just a second. How many men, all total, what did you see there? - -strange men there.

A. Yeah.

Q. How many did you see?

A. Three.

Q. Can you tell me now - -you've talked about a man with an Afro, and you said he had some kind of jacket on, but you don't remember the color?

A. I don't remember.

Q. And he did not have gloves on; is that right?

A. No.

Q. Do you remember anything else about this man with the Afro?

A. No.

Q. Then you said there was another man you've talked about as being chubby or fat?

A. Yeah.

Q. What kind of hair did he have, do you remember?

A. He had short hair. He was kind of tall. He had gloves on.

Q. Do you remember what color the gloves were?

A. Yeah. Brown.

Q. Do you remember anything else about what kind of clothes this chubby man had on?

A. No.

Q. Do you remember his jacket or anything like that?

A. Huh-uh - -no.

Q. Do you remember his shoes?

A. No.

Q. Then you say there was a third man that you saw there at your house?

A. Yeah.

Q. What can you tell me about what he looked like?

A. Short hair, mustache, a red jacket. And that's all I know.

Q. Do you know what a jerri curl is?

A. Yeah.

Q. Did any of these three men have jerri curls?

A. No.

Q. Did the man with the red jacket have on gloves?

A. I can't remember.

Q. The man with the red jacket, do you remember anything else about him, what he had on or - -

A. No.

Q. Did you hear any of these men talk at any time they were in your house?

A. I've forgot.

Q. Did you notice whether any of them had any kind of accents, like they sounded they were from someplace else?

A. Yeah.

Q. You did notice that?

A. Yeah, I noticed that they were talking kind of strange, like Jamaicans or something like that.

Q. Have you heard Jamaicans talk before around your neighborhood?

A. No. Well, Bam said something about they were Jamaicans, something like that.

Q. I'm sorry - -go ahead.

A. Something like that. He said something like that.

Q. So your Uncle Bam told you at some time that they were Jamaicans?

A. Yeah.

Q. Do you remember when it was that Uncle Bam told you that?

A. No – yeah, it was the time two men came over there with guns and a bagful of money and some powder.

Q. That was over to Uncle Bam's house or over to your mom's house?

A. Bam's.

Q. Was this before your mom got hurt or after your mom got hurt?

A. This was before.

Q. And at that time did you hear those men talk?

A. Yeah.

Q. And then your Uncle Bam told you they were Jamaicans?

A. No, he said something about Jamaicans.

Q. I don't want to put words in your mouth. But was there something about these three men at your house that night that reminded you of those men that your Uncle Bam told you were Jamaicans?

A. Yeah, because two of them I knew from - -from Bam's house.

Q. Two of them you'd seen at Bam's house?

A. Yeah.

Q. And they were the Jamaicans?

A. Yeah.

Q. Did you know their names?

A. One, the chubby guy, he goes by Ajax.

Q. And you're sure that this was the same guy that you saw at your house?

A. Yeah.

Q. Do you know any other name that he goes by besides Ajax?

A. No.

Q. And do I understand that right, that it's Ajax, like the soap, and not A.J., like two initials?

A. I don't really know. I don't know if it's Ajax or A.J.

Q. It sounds something like that, hmm?

A. But I really think it's A.J. or Ajax, one of those.

Q. Something like one of those names?

A. Yeah.

Q. But you don't have any - -you're sure that it was the same guy?

A. Yeah.

Q. And then which of the other two - -you said two of them you knew, that your Uncle Bam had told you that were Jamaicans?

A. Yeah.

Q. The chubby one was the one that was Ajax?

A. Yeah.

Q. Then which of the other two had you seen at your uncle's house, the guy with the short hair and a mustache or the guy with the red jacket? - -or wait. That's the same guy, isn't it?

A. The one with the Afro.

Q. That was the other guy you'd seen at your Uncle Bam's house?

A. Yeah.

Q. And your Uncle Bam had told you he was a Jamaican, or you'd heard him say that?

A. Yeah.

Q. And then as I understand this, what you're saying, had you ever seen the guy in the red jacket before?

A. No.

Q. So let's go back to what was happening then?

First of all, the guy in the red jacket, did you hear him talk at all?

A. No.

Q. Did you have any way of telling whether he had some kind of accent like a Jamaican, or sounded like he was from someplace else?

A. No. I never did hear him talk.

Q. So, then, let's go back to what was going on. So after you woke up and then they brought your mom in once and they threw her against the TV, then what's the next thing you remember happening? You'd already wakened Deonta. Did Deonta get up or did he stay in his bed?

A. He stayed in bed.

Q. And then what do you remember happening next?

A. After he got up or after I woke him up?

Q. Just start after - -you first woke up and then you saw your mom being thrown around. Then what was the next thing you know happened?

A. Not really. They just cut off the lights and left.

Q. Let me ask you some questions, th[illegible]. After you woke up and you knew that there was something going on, like you told Deonta, did you go to the door of your bedroom? Did you look out - -

A. No. I went over in the other door and looked - -peeked around the corner.

Q. So then you looked out into the frontroom, is that right?

A. Yeah.

Q. And that's also - - There are two rooms there, there's the one that leads to the porch, and then you had the kind of middle room where the couches were and stuff; is that right?

A. Yeah.

Q. When you looked out, could you see both of those rooms?

A. No.

Q. Which room could you see?

A. I could see the other room with the broken TV. It's the - -it's the other living room.

Q. Is that the room with the fireplace or without the fireplace?

A. Fireplace?

Q. Do you remember there was a fireplace there?

A. I don't remember a fireplace.
Q. Was it in the room with the windows, lots of windows?

A. Yeah, it was the room with the big window in front.

Q. And that was the room that looked out on 42nd Street? - -do you remember that? Or did the windows look out on the front porch?

A. The front porch.

Q. So that's the room you could see; is that right?

A. Yeah.

Q. When you looked out, what could you see?

A. I could see the man with the short hair and the red jacket holding up Don.

Q. Now, do you mean to - -the man with the short hair being the short Afro, or the guy with the red jacket had short hair?

A. Yeah.

Q. So you saw one guy, the guy with the red jacket, and he was holding up Don?

A. Yeah.

Q. What do you mean, holding him up?

A. By his shirt.

Q. Was Don laying down on the floor or was he standing up or - -

A. Standing up.

Q. And what else did you see?

A. I saw a man coming with a knife, so I jumped back into the bed.

Q. Which of these three men, if you remember, was the man coming with the knife?

A. It was the fat, chubby one.

Q. The fat, chubby one that you said was Ajax or A.J.?

A. Yeah.

Q. Did you see if any of these men had guns?

A. Yeah. The one with - -in the red jacket.

Q. Did he have a gun when he was holding Don Wright up or did you see that later?

A. I saw the gun later.

Q. So as I understand it so far, you went to the door and you looked out and you saw this man in the red jacket holding Don Wright up; is that right?

A. Yeah.

Q. And then you saw the man with the Afro coming with the knife?

A. (The witness nodded.)

Q. And so you jumped back in the room, right?

A. Yeah. I jumped back into bed.

Q. Into bed. Okay. Do you know where your mom was at that time, when you were looking out?

A. Yeah - -no - -no, I think she was in the frontroom. And then Ajax brought her in the other room with the TV.

Q. Was Don Wright tied up when you saw him being held up?

A. Yeah.

Q. Did you actually see anybody cut Don Wright?

A. Yeah.

Q. Did you see that before you jumped back into your bed or - -

A. Yeah.

Q. - -when was it that you saw it?

A. I saw it before I jumped back into the bed.

Q. So you saw this man, Ajax or A.J., coming toward Don Wright with the knife, is that - -

A. Yeah.

Q. Is he the one that cut Don Wright or somebody else?

A. He was the one who cut Don Wright.

Q. And at that time did you see where the man with the short hair and mustache was?

A. Yeah. He was right by the door.

Q. The front door or the door that you were at?

A. The front door.

Q. Then you jumped back into the bed?

A. Yeah.

Q. And what was the next thing that you saw happen? Did anyone else come into your room then or did you get up again or what happened next?

A. The one with the Afro came in.

Q. Came into your room?

A. Yeah.

Q. And what happened then?

A. Then he put his hand in the light bulb - -the one without the light bulb.

Q. You mentioned that earlier. Were you confused, then, and it really happened - -did he come in then and put his hand in the light bulb, that's when - -

A. Yeah - -I think he was searching for the powder.

Q. Do you know whether powder is ever kept in places like that?

A. No.

Q. Did you hear anything while you were either standing there at the door or going to - -or jumped in bed? - -I mean, did you hear anybody say anything or anybody call out?

A. I can't remember. Yeah, I - -when I woke up?

Q. Yes.

A. Yeah, I heard Don screaming and hollering.

Q. Do you know, was he saying words or was he just screaming?

A. Really, he was just screaming and hollering.

Q. Did you hear your mom screaming or hollering?

A. No

Q. So after you jumped back in bed and then the man with the Afro came in and looked around in the light, then what happened?

A. Then Ajax came in, and he had my mom by the hair and threw her into a chair.

Q. When you say the man with the hair, you're talking about the one with the Afro?

A. No, the big chubby one.

Q. Did the man - -the big chubby one have an Afro or not?

A. No, he didn't.

Q. He had what kind of hair?

A. Short.

Q. Short hair. Okay. Did he also have a mustache?

A. No.

Q. So Ajax, he's the guy, the chubby one, he came in and threw your mom - -he had your mom by her hair, you said?

A. Yeah.

Q. And then what did you see happen?

A. He just left.

Q. Did he just throw her down or leave her there?

A. Yeah, he left her in the chair.

Q. And then what happened?

A. I don't know after that. He - -then the one with the Afro just kept on looking between the halls.

And then I woke my brother up.

Q. Had you already woken your brother up once?

A. No. This is the first time I woke him up.

Q. Go ahead.

A. And then I woke him up and said, Deonta, something is going on. Then he was about to go back to sleep. You know, I shook him again and said, Something is going on. And then he said, What? What? And then he said that twice. And then he - -then he stayed up and was looking around, he was in the corner of the bed - -no, I was in the corner of the bed.

Q. Did you wake Deonta up before you saw Don Wright get cut or after?

A. After.

Q. And then you two stayed on the bed?

A. Yeah.

Q. Was your mom in the room by that time?

A. In the playroom.

Q. In the playroom. Was she in the room you were in?

A. No.

Q. Okay. She was in a different room. Then what did you see happen?

A. Then me and my brother was watching for a little while. And then Ajax came and picked up my mom and threw her against the TV, and Deonta started screaming and hollering. And then Ajax came in and he hit Deonta up aside his head twice and told him to be quiet and then he had a big knot on his head.

Then one guy looked between the halls. Then - -

Q. Which guy was looking? Was that the guy with the Afro or- -

A. Yeah.

Q. Okay. Go ahead.

A. And then he came back and tied me and my brother up. And the next thing - -and then he stuffed something in our mouth.

The only thing I know, they just cut off the lights and left.

Q. Before they left and before you were tied up, did you see anything happen to the man that was there visiting your mom? Did you see him get cut at all?

A. No. He got hit against the head with a gun.

Q. You saw that happen?

A. Yeah.

Q. Did you see which of the three men did that? - -if you remember.

A. No.

Q. You don't remember, or you didn't see?

A. I didn't really see it, I just - -he just had a big know on his head.

Q. Did you see anything happen to your mom? Did you see anybody cut your mom?

A. Yeah.

Q. When was that - -

A. No, I didn't see her. But she had a cut on her neck.

Q. She got cut, that's for sure. But did you see it happen?

A. No.

Q. So do you know which man did it?

A. No.

Q. So the only cutting you saw was Don; is that right?

A. Yeah.

Q. After they cut off the lights and left, then what did you do?

A. Hopped into the bathroom and we saw a knife, so we cut ourself loose. Then my brother went in there and looked at mom, and he said, I'll be right back. So he ran down to the store. We - -me and my brother sleep in our clothes, we don't sleep in our pajamas.

So he run down to the store where the pay phones are and he dialed operator, and the hospital, and the police.

And he came back and told my mom to put a towel on her neck - -a wet towel on her neck. And she didn't want to, because it would hurt.

So then the police - - No, my brother cut on the light in the other room, and this one guy got up and said, cut them back off. And then he cut them off, and the police came.

Q. Who was it that said, cut them back off, was that the guy that was there visiting your mom and Don Wright?

A. Yeah.

Q. Did you ever hear anybody talk about going over to 5030 Woodland? Did you hear the man say anything about - -the man who was visiting there, or did you hear any of these three men say anything about 5030 Woodland?

A. No.

Q. Was it you that cut the rope off your mom, or was it Deonta?

A. It was Deonta.

Q. And then it was Deonta who ran and called the police?

A. Yeah.

Q. This knife that you used to cut your ropes, you say you got it out of the bathroom?

A. Yeah.

Q. Had it been in the bathroom before you to bed, do you know?

A. No, it wasn't.

Q. Did you notice whether this knife had any blood on it?

A. Yeah, it had some blood on it.

Q. When was it that you noticed that it had blood on it?

A. It was on the blade. It was when me and my brother hopped in the bathroom.

Q. Did you use that knife to cut the tapes off your mama or did you use a different knife?

A. The same knife.

Q. Did you see any cars come to your house that evening or leave from your house, anybody come in cars?

A. Yeah.

Q. What kind of car did you see?

A. No, I didn't see any cars, but I think the one man that came to our house had a car.

Q. So you just - -did you hear it, maybe?

A. No.

Q. What about these three men that came to your house, you didn't see how they left, did you?

A. No.

Q. And you said that Ajax had gloves on and the guy with the Afro had gloves on?

A. Yes - -no, the guy with the Afro didn't have gloves on.

Q. So Ajax and the guy with the red jacket had gloves on?

A. No.

Q. Tell me again, then.

A. The guy with the red jacket on didn't have gloves, it was only Ajax.

Q. Only Ajax. Okay.

(Discussion was had off the record.)

Q. (By Ms. Schenkenberg) Let me just ask you one more question - -one or two more.

You said that you knew Ajax's name - -you knew Ajax and he was chubby, right?

A. Yeah.

Q. And then the guy with the Afro was the other one that you'd seen over to your uncle's house; is that right?

A. Yeah.

Q. Did you know his name?

A. No.

Q. Had you ever heard him called anything?

A. No.

MS. SCHENKENBERG: That's all I have.

MR. BERRIGAN: Do you have any questions, Mr. Hall?

MR. HALL: Thank you very much. We appreciate you coming down. Okay?

THE REPORTER: Do you want to waive signature on this?

MR. HALL: Yes. (Wit.excsd.)

(The witness's signature was waived.)

NOTARIAL CERTIFICATE

STATE OF MISSOURI)
COUNTY OF JACKSON)ss.

I, PHYLLIS M. MAIER, CSR, Registered Professional Reporter, a Notary Public in and for the State of Missouri, hereby certify that there came before me on the day, between the hours and at the place set forth in the caption page hereof, witness:

RAYMOND KINNEY

who was by me first duly sworn; that the witness was examined and the examination was taken down in machine shorthand by me and thereafter transcribed as set forth in the preceding 51 typewritten pages.

I further certify that it was agreed by counsel and the

witness that the signature of the witness to this deposition was expressly waived and that said deposition is now herewith returned.

I further certify that I am not counsel, attorney or relative of either party of the attorney for either party or otherwise interested in the event of this suit.

Witness my hand and notarial seal at Kansas City, Jackson County, Missouri, on September 27, 1988.
My commission expires February 11, 1992.

_____

Notary Public, State of Missouri
(Commissioned in Jackson County)

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LEAMON WHITE,	)	
	)	
Appellee/Petitioner,	)	
	)	
vs.	)	No. 04-2772
	)	
DON ROPER,	)	
	)	
Appellant/Respondent	)	

PETITION FOR REHEARING WITH SUGGESTIONS FOR REHEARING EN BANC

Respondent disagrees, of course, with the specific impact of the panel's decision on this case. The panel decided it in a manner that deviates substantially from the standard set forth in the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). But of greater concern is the impact of the panel's ruling on criminal cases, specifically on the role of defense counsel. By announcing a new standard for ineffective assistance of counsel, the panel would dramatically change the burdens imposed on criminal defense counsel, significantly increasing the cost of defense or significantly increasing the number of instances in which counsel is ineffective – or both. Respondent asks the panel and the court en banc to reconsider the ruling - - but at minimum, Respondent asks the panel and the Court to modify the holding so as to avoid the extensive impact that the panel's decision could have.

In the court's August 2, 2005, decision, the court granted habeas relief to petitioner because it felt that his Sixth and Fourteenth Amendment rights were violated because he received ineffective assistance of trial counsel. The panel

acknowledged that Raymond Kinney testified at petitioner's trial, but found counsel ineffective because his brother, Deonta, did not testify (Panel Opinion, pages 4-5). The court also found counsel was ineffective for declining to call Dorothy Merrell.

Under petitioner's theory of relief, Merrell would have testified that she did not see petitioner with Buckner hours before the murder, but Merrell did see Buckner with A.J. Constantine (Panel Opinion, page 3). Deonta may have testified that Constantine may have been another person at the house where the murder occurred (Panel Opinion, page 3). Neither factor, even if true, constitutes a breach of duty by trial counsel nor resulting prejudice under Strickland v. Washington, supra.

Merrell

Petitioner failed to show either a breach of duty or Strickland prejudice as to Dorothy Merrell. At her deposition, Merrell testified that Buckner and "A.J." came to her crack house "to kill us, because they' d known that we sold drugs" (Merrell Dep. Tr. 16). According to Merrell, they did not have drugs in the house at that time; thus, Buckner and "A.J." did not kill them (Merrell Depo. Tr. 16). Then, according to Merrell, the victim Don Wright volunteered that he had drugs to sell (Merrell Depo. Tr. 17-19). But Merrell knew he did not (Merrell Depo. Tr. 19). According to Merrell, Carol Kinney knew and told Don Wright that Don's statement would get them killed (Merrell Depo. Tr. 19-20). According to Merrell, Don Wright and Carol Kinney left and returned to their home (Merrell Depo. Tr. 22). According to Merrell, Buckner and A.J. left five to ten minutes later (Merrell Depo. Tr. 22-23). There should be no finding of ineffective assistance of counsel from this proposed testimony.

Initially, petitioner cannot show a breach of duty by trial

counsel. Petitioner does not overcome the strong presumption that trial counsel acted reasonably in declining to call Merrell to testify. Strickland v. Washington, 466 U.S. at 689; Bell v. Cone, 535 U.S. 685, 702 (2002). Trial counsel could reasonably decline to call Merrell because she did not view the assaults and murder of January 6, 1987. Trial counsel could reasonably decide not to call Dorothy Merrell due to her employment with illicit drug sales. Trial counsel could reasonably decide not to call Dorothy Merrell because her testimony did not make good sense. If her testimony were true, then Don Wright was deliberately placing himself in danger by selling drugs to Buckner and "A.J." Similarly, Carol Kinney was placing herself and her two children in danger by leaving the house with Don Wright. The testimony was no intuitive, and trial counsel could reasonably determine not to call Merrell.

The premise of the panel's decision was that trial counsel's investigation was too superficial to discover Merrell's testimony (Panel Opinion, page 5). Nothing about Merrell's testimony directly countered the state's evidence in that the Merrell testimony concerned events that occurred hours before the assaults and murder. See Rompilla v. Beard, No. 04-5462, slip op. at 4 (U.S. June 20, 2005). Indeed, as to both elements under Strickland, whether there was a breach of duty and resulting prejudice, the proposed testimony of Merrell concerned events even the panel described as "earlier on the night of the murder" (Panel Opinion, page 3). Such testimony by Merrell concerning a drug transaction hours before the assaults and murder are not even admissible under Missouri state law. Merrell's testimony would not demonstrate that "A.J." committed the murder or that petitioner did not. Merrell did not have testimony directly connecting "A.J." with the murder; thus, the testimony would have been inadmissible. See Evans v. State, 85 S.W.3d 750 (Mo. App. E.D. 2002). Under Missouri law, there must be proof that some other person committed some act directly connecting him with the crime,

State v. Meyers, 997 S.W.2d 26 (Mo. App. S.D. 1999); Helmig v. State, 42 S.W.3d 658 (Mo. App. E.D. 2001), and Merrell provides no such evidence. Petitioner cannot demonstrate that he received ineffective assistance of counsel from the failure to investigate or introduce inadmissible evidence. See Wood v. Bartholomew, 516 U.S. 1 (1995) (inadmissible evidence not material under Brady).

Deonta Kinney

The analysis of the panel as to Deonta Kinney is also outside the proper Strickland analysis. As noted, Deonta Kinney was a son of assault victim Carol Kinney. As noted by the panel, Deonta's brother, Raymond, testified as petitioner's trial for the defense (Tr. 998). Raymond, a ten year old student, was in the house where the murder of Don Wright occurred (Tr. 998-99). Raymond heard the voices of the men present (Tr. 999). One of the voices had a Jamaican accent (Tr. 999). Petitioner was not the man with the Jamaican accent at the house (Tr. 1000). The district court found that counsel was aware of the brother, Deonta, from the police report (Memorandum, page 14 citing Hearing Tr. 85, 89). Trial counsel did not call Deonta to testify at the guilt phase (Tr. 998). Under Strickland, that decision is strongly presumed to be reasonable and should not be the basis for the finding of ineffective assistance of counsel. 446 U.S. at 689; Bell v. Cone, 535 U.S. at 702. at the evidentiary hearing before the district court, petitioner did not present Deonta to testify about what he would have testified had he been called at petitioner's trial. Given this omission, petitioner can show neither a breach of duty nor resulting prejudice as to Deonta.

The panel opinion echoed the district court's conclusion that it was inexplicable why Deonta was not called to testify when Raymond had already been called (Panel Opinion, page 5). Of course, as noted by the panel, trial counsel passed away

1996 before the 2004 federal evidentiary hearing (Panel Opinion, page 4). Several reasons, however, come to mind for counsel not to call Deonta. Raymond testified "well" at the guilt phase (Tr. 998); thus, there was no reason to risk calling Deonta. Perhaps intangibles such as eye contact and demeanor counseled in favor of calling Raymond instead of Deonta at the guilt phase. Or Deonta could not testify that petitioner was not involved in the murder. These would be good reasons not to call Deonta.

The panel's finding of breach of duty and resulting prejudice is based on the assumption that Deonta would have testified at petitioner's trial the same as he testified at co-defendant Buckner's trial (Panel Opinion, page 3). The assumption is not self-proving, and petitioner presented no evidence to support this assumption before the district court. Deonta did not testify at the federal court's evidentiary hearing. Deonta's testimony is not exculpatory. Deonta testified that he did not see his mother being stabbed (Buckner Tr. 801). While Deonta identified "A.J." as being in the house (Buckner Tr. 800), this testimony did not exclude petitioner as being one of the perpetrators.

From a practical perspective, the panel decision seems to place on defense counsel the duty to attend the co-defendant's trial, in this case, the Buckner trial (Panel Opinion, pages 3, 4). In contrast, the Strickland court made clear that there were no absolute constitutional duties by trial counsel. It does not seem reasonable to impose on all defense counsel in the circuit the duty to attend all co-defendant's state and federal trials for however long they may last. Such a constitutional duty also creates the question of whether there is a constitutional duty to request to be the last trial so that all co-defendant trials can be observed first. Instead, as Strickland requires, trial counsel is to perform reasonably, an issue that requires subtle analysis given the nature of the crime scene. See Rompilla v. Beard, slip

op. at 10, n.4. And in this, trial counsel did. Rehearing or rehearing en banc is warranted in this case.

WHEREFORE, for the reasons herein stated, respondent repays that the Court grant his motion for rehearing, or in the alternative, for rehearing en banc.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
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/s/
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was faxed, this 16th day of August, 2005, to:

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/s/
Stephen D. Hawke
Assistant Attorney General

PORTION OF TRANSCRIPT OF TRIAL OF RESPONDENT (February 6, 1989)

LEAMON WHITE,

previously duly sworn, testified further as follows:

EXAMINATION by Mr. O'Connor:

Q. State your name, please, for the record.

A. Leamon White.

Q. And you're the defendant in this case?

A. Yes, sir.

Q. And you're on trial before the jury now for first degree murder in which the State is asking for the death penalty?

A. Yes, sir.

Q. And you've sat here through the entire trial, is that true?

A. Yes.

Q. Now, you understand that we're going to enter into the stipulation that was just - - that you just read about your dental records, and then we're going to rest. Did you hear the judge say that, and me agree?

A. Yes.

Q. You understand that you as a defendant, like any defendant in any case, has the right to testify in his own behalf, do you understand that?

A. Yes.

Q. And you understand that the right to testify is the sole decision to be made by the person who's in charge of the person on trial which is in this case you?

A. Yes.

Q. And you can listen to Mr. Duncan and I as to whatever advice we give you pro and con on whether or not we believe you should or should not testify, and we're entitled to do that by law. But it is your decision and your decision alone on whether or not you want to take the stand and testify in your own behalf. Do you understand that?

A. Yes.

Q. Now, Mr. Duncan and I have discussed with you whether or not you're going to testify in this case. Is that true?

A. Yes.

Q. And we told you, did we not, that it was our collective opinion that you should not testify. Is that correct?

A. Yes. Yes.

Q. And we based that partly on, a great deal on, I guess, your prior criminal record. Is that true?

A. Yes.

Q. And you have several prior felony convictions?

A. Yes.

Q. And you understand that it would be proper scope of cross-examination for the prosecuting attorney to inquire about any prior felony or misdemeanor convictions that you had, do you understand that?

A. Yes.

Q. And that also that they could get a special instruction from the judge on the fact that you had prior convictions and that the jury could consider those prior convictions in determining whether or not they wanted to believe your testimony, do you understand that?

A. Yes.

Q. Now, you understand that those prior convictions could not be used in any way to suggest that since you committed those crimes that therefore you committed this crime, do you understand that?

A. Yes.

Q. In other words, the prosecutor could get up here and say, "Well, he's got all these convictions, he must have done this." They can't use those convictions other than to affect your credibility on whether or not the jury should believe your testimony. Do you understand that?

A. Yes.

Q. Now, what is your personal decision as to whether or not you are going to or you want to testify in this case?

A. Not testify.

Q. And is that something that you've thought about?

A. Yes.

Q. Do you understand your right to testify?

A. Yes.

Q. Now, from a tactical standpoint certain things happen during a trial where lawyers and the defendant make certain decision about witnesses, and have been made in this case, is that true?

A. Yes.

Q. And by saying that we're resting we are making a decision, Mr. Duncan and I, along with you, to not call Charles Ross of the Public Defender's Office, Ben Kinney, Laura Tyler, Clarence Gibson or Deonta Kinney, is that right?

A. Say that again.

Q. All right. Have we made the decision based on the way the testimony has gone in that we are not going to call Charles Ross, Ben Kinney, Laura Tyler, Clarence Gibson or Deonta, D-E-O-N-T-A, Kinney?

A. Yes I agree with that because you and Mr. Duncan suggested that.

Q. All right. And you understand that we went into the individual reasons why we suggested to you not to call these witnesses?

A. Yes.

Q. The pros and cons of what their testimony would be. Right?

A. Yes.

Q. And the fact that any of their testimony is subject to rebuttal from the prosecutor's office?

A. Yes.

Q. All right. And you understand that under the rules of discovery that the prosecutor wouldn't have to tell us what they had in rebuttal because rebuttal is just what it is, it's rebuttal, and until witnesses testify they do not have to provide the rebuttal evidence to you unless you were using the defense of alibi to where they had evidence that could refute your alibi, do you understand that?

A. Yes.

Q. After talking with Mr. Duncan and I, it's your decision, along with us, with our decision, not to call any of the witnesses I just previously named?

A. Yes.

Q. Now, you're charged with murder in the first degree. The lesser included offense of murder in the first degree is murder in the second degree. There could be an argument made by us, for you as the defendant, that the judge should instruct the jury on murder in the second degree because there is in my opinion an issue of whether or not the deliberation is there to support a conviction by a jury of murder in the first degree. Have we discussed that?

A. Yes, we discussed that.

Q. All right. Have we also discussed the fact that if we made an argument to the judge, and I think a good argument could be

made, that it's kind of up to the Court on whether or not the instruction is warranted under the evidence, than then the jury could compromise the verdict and not find you guilty of murder in the first degree but find you guilty of murder in the second degree because they kind of compromise out and find you guilty when otherwise they wouldn't find you guilty of the original charge? Have we talked about that?

A. Yes.

Q. Our feeling, collectively, as we've told you, is that we believe that we should submit on murder in the first degree only because the facts I think in a great extent support either a murder 1 or nothing against whoever committed these crimes.

A. Yes.

Q. Now, do you want us to request the judge and make an argument on your behalf for a murder in the second degree instruction?

A. No.

Q. Now, murder in the second degree, the punishment is 10 to 30 years or life imprisonment. Do you understand that?

A. Yes.

Q. And right now you're sitting with either life with no parole or the death penalty if found guilty. Do you understand that?

A. Yes.

Q. So if we submitted murder in the second degree, even if the jury found you guilty you would still have a chance at some dy in your life to get out of jail. Under this other circumstance you

will never get out of jail if convicted.

A. I understand.

Q. And it is your decision that we submit on murder in the first degree and not request the Court to submit the lesser included of murder in the second degree?

A. Yes.

KANSAS CITY, MISSOURI POLICE DEPARTMENT
INVESTIGATIVE REPORT (CASE DOCUMENT)

Case # SUPP 87-002063

Title of Investigation Subject of Report

HOMICIDE: INTERVIEW:

WRIGHT, DON, RAYMOND L.
B/M, 11-8-58KINNEY, B/M, 10-26-78

4201 Prospect DEONTA D. KINNEY,
B/M, 9-10-77

Report By: DET. LEE FLOYD
Assignment: Homicide Unit
Date:1-6-87Page1 of 2 Pages

On 1-6-87, at approximately 0628 hours, Detective Lee Floyd and Detective David Ray responded to 4201 Prospect, on a cutting. Upon arrival it was learned that RAYMOND and DEONTA KINNEY (CAROL KINNEY's sons) had been in the residence when the offense occurred. At 0702 hours Detective Floyd accompanied the juveniles to police headquarters in Police Officer Gabriella Pfeifer's (Radio 334) vehicle. En route to headquarters the children were brought milk, orange juice, cookies and pancakes, in an attempt to place them at ease. The children were interviewed and a video statement was obtained ay approximately 0840 hours. DEONTA KINNEY had been struck in the head by one of the suspects and was shy and scared. The video statement was taken with both juveniles present because they did not want to be left by themselves.

In the interview, prior to, during and after the statement, RAYMOND KINNEY stated that there were three suspects, one wearing a red jacket, one a black jacket and yellow gloves and one with a black jacket, possibly with black gloves. The man in the red jacket had a black gun. One of the men was described as fat. One of the men was described as having a jerry curl. The man in the red jacket "talked funny." The man in the black jacket was described as a Jamaican by RAYMOND KINNEY although RAYMOND could not say why he believed this man was a Jamaican.

They stated they did not see a suspect vehicle.

The children later separately viewed a photo line-up including a picture of ROGER BUCKNER, KCPD #163737. Neither child identified BUCKNER as a suspect.

DEONTA KINNEY identified a photograph of a black male known to him as "AJAX" or "A.J.", CHRISTOPHER CONSTANTINE, BM, 11-15-61. This photo was among a group of photos of known drug users.

DEONTA KINNEY stated that he had seen A.J. at his uncle BAM's (BENJAMIN KINNEY's) house on previous occasions.

RAYMOND KINNEY stated after the video statement that he believed the address 5030 Woodland was 53rd and Woodland.

The children were released to their grandfather,

HAROLD KINNEY, 11018 Wabash, 942-3455.

CONTINUATION

Case # Supp #87-002063
Date 1-6-87

The four photos shown to the children in a photo line-up were maintained by DET. CLARENCE GIBSON for investigative use.

At 0930 hours, PO JAN HOWARD, radio #224, stated she had checked for a residence at 5030 Woodland and there was no such address.

Both of the children were of the opinion that DON WRIGHT's friend (ERNEST BLACK) and DON WRIGHT knew the three suspects.

dm/ jlc

Missouri Supreme Court Rule 29.15 of the Rules of Criminal Procedure

RULE 29.15 CONVICTION AFTER TRIAL – CORRECTION

(a) Nature of Remedy – Rules of Civil Procedure Apply. A person convicted of a felony after trial claiming that the conviction or sentence imposed violate the constitution and laws of this state or the constitution of the United States, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15. This Rule 29.15 provides the exclusive procedure by which such person may seek relief in the sentencing court for the claims enumerated. The procedure before the trial court is governed by the Rules of Civil Procedure insofar as applicable.

(b) Form of Motion – Time to File – Cost Deposit Not Required – Notice of Filing, to Whom–Failure to File–Effect of. A person seeking relief pursuant to this Rule 29.15 shall file a motion to vacate, set aside or correct the judgment or sentence substantially in the form of Criminal Procedure Form 40. If an appeal of the judgment sought to be vacated, set aside or corrected was taken, the motion shall be filed within thirty days after the filing of the transcript in the appeal pursuant to Rule 30.04. If no appeal of such judgment was taken, the motion shall be filed within ninety days of the date the person is delivered to the custody of the department of corrections. No cost deposit shall be required. Movant shall give notice of the filing of the motion to any court in which the appeal of the judgment of conviction is pending. Failure to file a motion within the time provided by this Rule 29.15 shall constitute a complete waiver of any right to proceed under this Rule 29.15.

(c) Clerks Duties. Movant shall file this motion and two copies thereof with the clerk of the trial court. The clerk shall immediately deliver a copy of the motion to the prosecutor. Upon receipt of the motion, the clerk shall notify the sentencing judge.

(d) Contents of Motion. The motion to vacate shall include every ground known to the movant for vacating, setting aside, or correcting the judgment or sentence. The movant shall verify the motion, declaring that he has listed all grounds for relief known to him and acknowledging his understanding that he waives any ground for relief known to him that is not listed in the motion.

(e) Pro Se Motion - Appointment of Counsel - Amended Motion, Required When–Withdrawal of Appointed Counsel. When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. Counsel shall ascertain whether sufficient facts supporting the grounds are asserted in the motion and whether the movant has included all claims known to him as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and grounds. For good cause shown, appointed counsel may be permitted to withdraw. If appointed counsel is permitted to withdraw, the court shall cause new counsel to be appointed.

(f) Amended Motion - Form, Time for Filing - Response by Prosecutor. Any amended motion shall be verified by movant and shall be filed within thirty days of the date counsel is appointed or the entry of appearance by counsel that is not appointed. The court may extend the time for filing the amended motion for one additional period not to exceed thirty days. Any response to the motion by the prosecutor shall be filed within ten days after the date and amended motion is required to be filed.

(g) Request for Hearing, Time for Filing – Hearing, Not Required, When – Time Hearing to be Held. A request for a hearing shall be made by motion on or before the date an amended motion is required to be filed. Within fifteen days after the date an amended motion is required to be filed, the court shall determine whether to grant a hearing. If no request for hearing is timely filed or if the court shall determine the motion and the files and records of the case conclusively show that the movant is entitled to no relief, a hearing shall not be held. If a hearing is ordered, it shall be held within sixty days of the date of the order granting a hearing.

(h) Presence of Movant–Record of Hearing–Continuance of Hearing–Burden of Proof. At any hearing ordered by the court the movant need not be present. The court may order that testimony of the movant shall be received by deposition. The hearing shall be on the record. The court may continue the hearing upon a showing of good cause. The movant has the burden of proving his grounds for relief by a preponderance of the evidence.

(i) Findings and Conclusions, Issued, When–Judgment. The court shall issue findings of fact and conclusions of law on all issues presented, whether or not a hearing is held, within thirty days of the submission of the case. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was illegal, or that there was a denial or infringement of the rights given movant by the constitution of Missouri or the constitution of the United States as to render the judgment subject to collateral attack, the court shall vacate and set aside the judgment and shall discharge the movant or resentence him or order a new trial or correct the judgment and sentence as appropriate.

(j) Appeal–Standard of Appellate Review. An order sustaining or overruling a motion filed under the provisions of this Rule shall be deemed a final judgment for purposes of

appeal by the movant or the state. If the court finds that a movant allowed an appeal is an indigent person, it shall authorize an appeal in forma pauperis and furnish without cost a record of all proceedings for appellate review. When the appeal is taken, the circuit court shall order the official court reporter to promptly prepare the transcript necessary for appellate review without requiring a letter from the movant's counsel ordering same. If the sentencing court finds against the movant on the issue of indigency and the movant so requests, the court shall certify and transmit to the appellate court a transcript and legal file of the evidence solely on the issue of indigency so as to permit review of that issue by the appellate court. Appellate review of the trial court's action on the motion filed under this rule 29.15 shall be limited to a determination of whether the findings and conclusion of the trial court are clearly erroneous.

(k) Successive Motions. The circuit court shall not entertain successive motions.

(l) Effect of Motion on Pending Appeal – Consolidation of Appeals. If a motion is filed under this Rule 29.15 and an appeal is pending from the judgment of conviction that is the subject to the motion, the appeal shall be suspended until final determination of the issues raised by the motion. Appellate shall give notice to the court where the appeals is pending of the entry of judgment on the motion filed under this Rule 29.15 within ten days of the entry of the judgment. If an appeal is filed from the judgment sustaining or overruling a motion filed under the provisions of this Rule 29.15, the appeal from the judgment of conviction shall be consolidated with the appeal from the judgment on the motion. The record on appeal shall consist of the transcript and legal file from both the judgment of conviction and the judgment ton the motion. If a claim of ineffective assistance of counsel was presented in the motion, the attorney representing movant on the motion filed pursuant to this Rule

29.15 shall be the attorney on appeal for the consolidated case.

(m) Schedule. This Rule 29.15 shall apply to all proceedings wherein sentence is pronounced on or after January 1, 1988. If sentence is pronounced prior to January 1, 1988, and no prior motion has been filed pursuant to Rule 27.26, a motion under this Rule 29.15 may be filed on or before June 30, 1988. Failure to file a motion on or before June 30, 1988 shall constitute a complete waiver of the right to proceed under this Rule 29.15. If a sentence is pronounced prior to January 1, 1988, and a prior motion under Rule 27.26 is pending, post-conviction relief shall continue to be governed by the provisions of Rule 27.26 in effect on the date the motion was filed.

(Added Feb. 11, 1987, effective Jan. 1, 1988. Amended May 23, 1987, effective Jan. 1, 1988).

CLAIMS FROM RESPONDENT WHITE'S PRO SE RULE 29.15 MOTION

MOVANTS CONVICTION WAS OBTAINED IN VIOLATION OF THE FOURTH, FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND IN VIOLATION OF ARTICLES 10, 17 AND 18A OF THE MISSOURI CONSTITUTION, WHEN MOVANTS COUNSEL RENDERED INEFFECTIVE ASSISTANCE. COUNSEL WAS INEFFECTIVE FOR AT LEAST BUT NOT LIMITED TO THE FOLLOWING:

A. When counsel, in apparent effort to circumvent the orderly process of post conviction proceedings required and compelled movant to take the witness stand, for the purpose of compelling movant, without the aid of conflict free counsel, to condone, verify and/or sanction trial counsels trial strategy, i.e. what witnesses to call, what questions to ask and what evidence to marshall in general. This improper conduct of counsel impermissibly invaded the province of the attorney client relationship and exposed movant to cross-examination by the state. Said conduct was prejudicial to movant.

B. When counsel, waived the right to exclude all witnesses from the courtroom by making an exception, and allowing the victims mother and brother to remain in the courtroom prior to their expected testimony. Failure to exclude these witnesses allowed them to hear the entire trial, resulting in them altering their expected favorable testimony. (Tr. 3)

C. When counsel failed and refused to make the proper objections to the trial court conducting voir dire that was not recorded by the court reported or by any other lawful means. Thus movant was denied a full and complete transcript from which to perfect his appeal. (it should be noted that the initial voir dire was conducted by a Judge who was not a sitting judge

in this case. This initial voir direing was not only conducted " off the record " but was also conducted outside the presence of movant and/or counsel.). (T.r. 18)

D. When counsel failed and refused to make the proper objection to the States improper voir dire. The States voir dire was improper because the State did not limit the questioning to general circumstances designed to aid in the selection of neutral jurors. The States questioning was in fact preceded by the State presenting it's versions of the specific facts of this case. This amounted to the State seeking to predispose the jurors, and the way they would vote on the specific facts of this case.(T.r. 81) (T.r. 172)

E. When counsel failed and refused to make the proper objection to the courts improper statement to the voir dire panels that movant could be pardoned by the Governor for a conviction of First Degree Murder. These statements by the court effectively advised the voir dire panels that a sentence of death imposed by the jurors was not final, thus undermining the reliability of the juries verdict by removing the responsibility of the burden for the imposition of death. (T.r. 207)

F. When counsel failed and refused to conduct any meaningful voir dire examination, and failed and refused to make any objections when same was obviously proper to the states request for jurors being struck for cause, when no legal cause existed for said strikes. Counsel also failed to make any effort to rehabilitate potential jurors who spoke ambiguously as to their position concerning the imposition of the death penalty. (210 . . .)

G. When counsel failed and refused to properly object to the court reading instructions to the jury, that only become proper at the close of all evidence, during voir dire.

H. When counsel failed and refused to make the proper objection when the States attorney, during voir dire examination impermissibly advised the jury as to what, in the

States attorneys opinion constituted First Degree Murder. The States attorneys personal opinions and legal theories were impermissibly placed before the jury, thus invading the province of the jury and the court. (362)

I. When counsel improperly agreed to the States request to have jurors struck for caused based upon their personal opposition to the death sentence. That is, counsel agreed to jurors being stricken for cause despite the fact that these potential jurors had in no way indicated that they were unable , or unwilling to put aside their personal opinions and follow the courts instructions. (T.r. 365)

J. When counsel without movants consent or knowledge agreed to allow the trial court to instruct the jury that in a previous case another defense attorney had in fact lied and misled a previous jury. (T.r. 442)

K. When counsel failed to properly object to the courts voir dire examination, on the grounds that said questions misrepresented the law, i.e. the court asked potential jurors if the jurors" . . . sentence him to death . . . ". This was not a proper question in that it did not elicit whether or not the juror was capable of considering the entire range of punishment allowed by law.

L. When counsel improperly agreed with the state to allow the court to excuse juror Hughes for cause due to illness. (T.R. 501) Thereafter defense counsel for no known or logical reason wastes one of movants peremptory strikes to remove this already removed juror (T.r. 501).

M. When counsel failed to properly object to the State advising the jury during opening arguments that the evidence would show that movant was involved in an ongoing and existing conspiracy. This statement by the State was improper in that the state never offered any evidence to support this claim, and counsel should have reasonably known that the State would not be forthcoming with such evidence, as no such

evidence had been disclosed during pre trial discovery.

N. When counsel failed to question witnesses Black and Kinney in such a manner as to make the jury aware of the fact that these witnesses had made prior inconsistent statements. Counsel failed to impeach these witnesses with their prior inconsistent statements and further failed to offer these inconsistent statements as substantive evidence for the juries consideration. The aforstated was done despite counsels knowledge of the inconsistent statements and to the movants prejudice.

O. When counsel failed and refused to conduct reasonable pre-trial discovery, including but not limited to interviewing and deposing States witnesses. Counsel conducted no pre trial interviews and took no depositions. Had counsel conducted reasonable discovery counsel would have been in a position to successfully challenges the credibility of the States key witnesses by impeachment with inconsistent statements and rebuttal.

P. When counsel failed to file a motion to suppress the in court identification of movant by witness carol Kinney, on the grounds that said identification was the product of impermissibly suggestive conduct by the State, and mistaken identity on the part of the witness.

Q. When counsel failed to properly impeach the testimony of Carol Kinney by offering the testimony of Ben Kinney. Counsel knew or reasonably should have known that Ben Kinney, if called would have testified that Carol Kinney had made statements prior to trial to Ben Kinney that were inconsistent with her trial testimony and in court identification of movant.

R. When counsel failed to object to the State improperly bolstering the testimony of the States witnesses concerning the in court identification of movant by presenting to the jury video tapes of the line up procedure employed

involving movant. The video tapes were shown to the jury in an effort to bolster the incourt identification prior to the witnesses credibility being placed in question.

S. When counsel failed and refused to honor movants request and present expert testimony to the effect that drug use had on the mind and on the minds ability to correctly receive, process and intrepit information. Had counsel presented said expert testimony the jury could have reasonably found that the incourt identification of movant was not reliable due to the witnesses admitted drug consumption and influence at the cogent times.

T. When counsel failed to call to the courts attention and failed to take the necessary steps to preclude the jury, witnesses and the general public from being able to overhear each and every bench conference. This includes conferences that were off the record and those recorded. Allowing the jury to overhear the bench conferences without question prejudiced movant, and defense counsel knew or reasonably should have known that all bench conferences were audible throughout the courtroom.

U. When counsel engaged in unethical and improper conversations with the victims immediate family members. Said conversations involved discussions by defense counsel concerning the merits of movants defense and movants trial strategy, all to the prejudice of movant. Defense counsel knowingly violated the attorney -client relationship by divulging the aforestated, and this conduct is more grievous when defense counsel knew or reasonably should have known that the victims family members were relaying all information to the States attorney.

V. When counsel failed to object to the State withholding and suppressing evidence favorable to movant, when said information became apparent during trial. The State had shown witness Kinney and Black a photograph of movant

prior to these witnesses making an identification of movant, and the witnesses did not recognize movants photograph as being one of the perpetrators. This was valuable impeachment evidence that was suppress and withhold by the State.

W. When counsel failed and refused to offer the testimony of Charlie Ross and Joyce Williams on movants behalf. Had these witnesses been called they would have provided testimony that impeached the States witness Ernest Black and provided movant with an alibi, respectively.

X. When counsel preceded to trial knowing there existed a conflict of interest between movant and other clients represented by Mr. Duncan. In that Mr. Duncan was unable to devote his full time and attention to movants trial due to proceedings being conducted in other forums at the same time as movants trial, thus resulting in Mr. Duncan leaving movants murder trial while court was in session to attend other proceedings. It is absurd for a defense counsel to pretend to represent a client in a capital case on a piece meal basis.

Y. When counsel failed to object to the trial courts failure to instruct the jury in a clear and understandable manner. The trial court instruction to the jury are so confusing and misleading that a juror could have misunderstood the instructions to require that a mitigating circumstance be unanimously found before it could be considered by a single juror as evidence in mitigations. See: MILLS VS. MARYLAND, _____ S.Ct _____1988.

Z. When counsel failed to object to the trial court trying and sentencing movant under the current Missouri death penalty laws on the grounds that said statutes are unconstitutional for at least but not limited to the fact that said statutes allow the prosecuting attorney totally unbridled discretion in who will be death eligible.

AA. When counsel failed and refused to request that the court instruct the jury on the lesser included offenses of

second degree murder and manslaughter when said instructions were supported by the evidence and when failure to so instruct denied movant equal protection under existing Missouri law.

BB. When counsel failed to request the court to instruct the jury that the testimony of a drug addict should be taken with caution and care.

CC. When counsel improperly questioned the States witness Black, in such a manner as to elicit very damaging and prejudicial information not theretofore presented, i.e. the in court identification of movant as being on of the perpetrators.

PORTION OF TRIAL OF RESPONDENT (Feb. 6, 1989)

CROSS-EXAMINATION by Mr. O'Connor:

Q: Deonta did pick out A.J.'s picture, though, right?

A.: He recognized his picture. Yes, sir.

Q: And you knew the boys had witnessed the crime? Correct?

A: Yes, sir.

Q: You had talked to them?

A: Yes, sir.

Q: And they gave you some pretty detailed information about he suspects, did they not?

A: Yes, sir.

Q: And then you showed them some photographs?

A: Yes, sir.

Q: After that?

A: That's correct.

Q: Are you telling us the purpose of showing the photograph was just to see if they knew people? Just, "Do you know these guys?"

A: No, sir. The purpose of showing the photographs was to identify any possible suspects.

Q: And then Deonta picked this pisture out, isn't that true?

A: Not as a suspect sir.

Opposition Brief Unavailable for Filming at this Time

(5)

No. 05-686

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

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No. 06-686

IN THE
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Petitioner,
v.
LEAMON WHITE,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITIONER'S REPLY BRIEF

The petition demonstrates why this Court should review this case. By holding White's trial counsel ineffective for not presenting inadmissible evidence, by deeming counsel's investigation inadequate without specifying what new information of assistance to the defense counsel would have acquired through a broader investigation, and by placing on petitioner the burden of proving the reasonableness of counsel's decision not to call two witnesses (one of whom could only have given redundant testimony), the Eighth Circuit contravened *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Strickland v. Washington*, 666 U.S. 668 (1984) – and created a circuit split. By deeming inadequate the Supreme Court of Missouri's abandonment remedy *allowing* consideration of some of White's postconviction claims, the Eighth Circuit turned on its head the independent and adequate state grounds doctrine as set forth in *Ford v. Georgia*, 498 U.S. 411 (1991). Contrary to the Eighth Circuit, that remedy was mandated by

settled Missouri precedent. White has no cogent answer to these arguments.

I. Ineffective Assistance of Counsel

1. According to White, "no serious question exists about the admissibility of Dorothy Merrell's testimony under Missouri law." Resp. Brief 12. White maintains that evidence of a third-party's guilt is inadmissible "only when it is 'conjectural' or 'disconnected and remote.'" Resp. Brief 13. Wrong: In Missouri, such evidence is inadmissible unless its proponent can establish that it is "of the kind that directly connects the other person with the *corpus delicti* and tends clearly to point to someone other than the accused as the guilty person." *State v. Rousan*, 961 S.W.2d 831, 848 (Mo. 1998) (en banc). That evidentiary rule has been Missouri's since at least 1968, *State v. Stokes*, 638 S.W.2d 715, 723 (Mo. 1982) (en banc), and, contrary to White's assertion, Resp. Brief 11, is materially identical to the South Carolina rule before this Court.[1] Under that rule, Merrell's testimony would have been inadmissible as a matter of law. As the petition makes clear, Merrell was not an eyewitness and could not even provide a motive or opportunity for the third party, A.J., to have killed Wright. Pet. 9. In fact, Merrell's statement that A.J. did not kill her *because* she did not have drugs created an inference that A.J. didn't kill Wright, who didn't have drugs, either. Pet. 9. That her testimony would have placed A.J. with one of the assailants at a house

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[1]The issue in *Holmes* is: "Whether South Carolina's rule governing the admissibility of third-party guilt evidence violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses." Pet. for Cert., 2005 WL 770655, at 2. Part of that rule is that "before such [evidence] can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party." *State v. Holmes*, 605 S.E.2d 19, 23 (S.C. 2004).

where the murder did not take place, that A.J. arranged to meet Wright at his house to buy drugs from him, and that he left Merrell's house to buy drugs from Wright does not exculpate White. As the Supreme Court of Missouri observed, White's argument "suggests only that one of the three assailants was not movant. How that exculpates [him] is not explained." App. 240. The Supreme Court of Missouri has upheld decisions excluding evidence much more probative than Merrell's. *See, e.g.*, *Stokes*, 638 S.W.2d at 716-17, 723 (affirming exclusion of evidence in capital murder trial that victim's boyfriend "had an opportunity to commit the crime; that his fingerprints were found in the apartment; that approximately two weeks prior to her death the victim had reported his assault upon her to the police; and[] that the police, after the instant crime, had first arrested and later released [him].").

2. White's contention that this case does not present a compelling reason for review is wrong. Whether counsel is ineffective for not trying to present inadmissible evidence and whether the state has the burden of producing reasonable grounds why trial counsel might not have decided to call certain witnesses are both important questions; and the Eighth Circuit's answers are contrary to *Wiggins* and *Strickland*. Pet. 6-16. This case also presents a conflict within the federal circuit courts of appeal. *See* U.S. Sup.Ct.R. 10(a). Unlike the Fourth, Seventh, Ninth, Eleventh, and D.C. Circuit Courts of Appeal, the Eighth Circuit granted relief on an ineffective investigation claim without specifying, and without requiring any specification of, what additional information counsel would have acquired through a broader investigation. This Court has never recognized such an abstract claim of an inadequate investigation as warranting a finding of ineffective assistance under the Sixth and Fourteenth Amendments.

3. In two significant respects, White has misrepresented the record. His claim that he "never argued and no court in this case has held that trial counsel had a duty to attend" the trial of co-defendant Buckner, Resp. Brief 12 n.5, is false. The district

court, in a section of its order entitled, "Issues Justifying Issuance of the Writ," noted that White's trial counsel did not attend the Buckner trial. App. 24. The Eighth Circuit then stated: "The district court concluded that counsel failed to conduct an adequate investigation because [trial counsel] . . . did not [among other things] attend Buckner's trial[.]" App. 4. Also false is White's claim that trial counsel must not have had a copy of the transcript of the Buckner trial, because there was no evidence he did and all inferences indicated he didn't. Resp. Brief 12 n.5. It was White's burden to plead and prove that counsel did *not* have these transcripts. *See Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986); Habeas Rule 2(c)(2). In the absence of evidence to the contrary, it is presumed that trial counsel had the transcript. *See Strickland*, 466 U.S. at 680; *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc). "On collateral attack, a silent record supports the judgment; the state receives the benefit of . . . all reasonable inferences." *Higgason v. Clark*, 984 F.2d 203, 208 (7th Cir. 1993) (Easterbrook, J.).[2]

4. Because petitioner didn't argue in the district court the inadmissibility of Dorothy Merrell's testimony, White, citing *Hormel v. Helvering*, 312 U.S. 552, 556 (1941), contends that petitioner has waived the argument. Resp. Brief 11-12. Not so; Habeas Rule 5(b), though requiring petitioner to address White's factual allegations and certain affirmative defenses, did not require petitioner to prove the inadmissibility of Merrell's testimony. It was *White's* burden to prove the testimony would have been admissible. *See Kimmelman*, 477 U.S. at 381 ("In order to establish ineffective representation, the defendant must prove both incompetence and prejudice."). When he didn't do

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[2]White makes other misstatements. He says, for instance, that Carol Kinney identified him as the killer "only after police showed [Carol Kinney] a photograph of [him.]" Resp. Brief 1. But the district court found "no evidence that [White's] photograph was ever shown to Kinney prior to her picking him out of the videotaped lineup." App. 12-13.

so, petitioner was entitled to point it out on appeal. *See United States v. Irizarry*, 673 F.2d 554, 557 (1st Cir. 1982). At most, White's argument establishes forfeiture (an oversight this Court can forgive), not waiver, for petitioner never intentionally relinquished his right to contest the admissibility of Merrell's testimony. *See Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004); *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005) (Posner, J.). *Hormel* requires arguments to be raised in the district court to prevent "litigants [from being] surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." 312 U.S. at 556-57. The question here is a question of law, however (which the Eighth Circuit had the discretion to consider, *see Universal Title Ins. Co. v. United States*, 942 F.2d 1311, 1314-15 (8th Cir. 1991)). It would be a manifest injustice to release a cold-blooded murderer because of counsel's non-submission of inadmissible evidence, and so *Hormel* itself authorizes consideration of petitioner's argument. 477 U.S. at 557.

5. White implies that because the trial court allowed his trial counsel to attempt to show that A.J. committed the crime, petitioner is estopped from arguing the inadmissibility of Merrell's testimony. Resp. Brief 11-12. Under *Strickland*, however, the determination of prejudice does not turn on "the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like." 466 U.S. at 695. The proper assumption, then, is that if trial counsel had offered Merrell's testimony, the prosecutor would have objected that the evidence did not directly implicate A.J. and exculpate White, and the trial court would have sustained the objection. Even if White might be correct (i.e., the prosecutor would not have objected or the trial court would have overruled the objection), such a windfall is not cognizable prejudice. *See Lockhart v. Fretwell*, 506 U.S. 364, 370, 372 (1993) ("Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.").

II. Independent & Adequate State Grounds Doctrine

1. White argues that the abandonment remedy was inadequate because it was a "hollow gesture," the first amended motion having been "thrown together in just 14 days," and White's second postconviction counsel having said "that he did not have enough time to file a timely amended motion after he entered his appearance." Resp. Brief 6-7. The question, though, is not whether the abandonment remedy was adequate, but whether the *procedural bar* (the time limitations of Rule 29.15(e) and (f)) was adequate. It was. The Eighth Circuit never held or implied otherwise, and this Court has never "held that a state procedural ground is inadequate simply because the state court possessed but did not exercise the discretion to excuse the procedural default." Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1141 (1986). White is also wrong on the merits. His second postconviction counsel did say that he was unable to timely file the first amended motion. But (1) the Supreme Court of Missouri cured the motion's untimeliness by deeming it timely; (2) neither White nor his second postconviction counsel complained at his abandonment hearing of lack of time to raise all grounds for relief in the first amended motion; and (3) White was (and is) estopped from complaining about the inadequacy of the first amended motion, for he executed a verification stating that all grounds for relief were included in that motion. Pet. 24. It must be remembered that White's initial Rule 29.15 motion raised twenty-nine claims for relief, Pet. 2, and White never told the lower court which claims he would have raised in a third amended motion that weren't raised in his first amended motion. In any event, White's complaint about the substance of the first amended motion is just a claim of ineffective assistance of postconviction counsel, which Missouri has never recognized. *State v. Owsley*, 959 S.W.2d 789, 799 (Mo. 1997) (en banc).

2. As discussed in the petition, it is an analytic confusion, and a violation of *Ford v. Georgia*, 498 U.S. 411 (1991), to weigh the adequacy of a procedural default by reference to the adequacy of the retroactive application of a judge-created exception to that default. Pet. 18-19. In response, White claims that the abandonment remedy "was as much part of Rule 29.15 as the timing and verification requirements themselves" and that "at the time [his] case came before the Missouri Supreme Court, abandonment by postconviction counsel was a well-established excuse for procedural default." Resp. Brief 18 n.6. But whether a procedural rule is firmly established and regularly followed and thus adequate is determined by reference to state jurisprudence at the time of the default. *Ford*, 498 U.S. at 424. White defaulted his postconviction claims in the state trial court, not in the Supreme Court of Missouri. Only after that default did the abandonment doctrine come into existence. So at the relevant time, the abandonment doctrine was not a part of Rule 29.15 at all.

3. Petitioner's argument is thus not aimed at the adequacy of the Eighth Circuit's application of the independent and adequate state grounds doctrine. Resp. Brief 15. That doctrine addresses the adequacy of the procedural rule whose application results in the default of a claim. The abandonment remedy afforded White ("adequate" or not) *did not bar any claims*, but rather excused their default. The Eighth Circuit's recitation of boilerplate procedural-default law, Resp. Brief 16, does not extinguish the conceptual confusion that is the *sine qua non* of the Eighth Circuit's inadequacy holding. *Cf. Holland v. Jackson*, 542 U.S. 649, 654-55 (2004).

4. White reiterates his contention, which the Eighth Circuit accepted, that before his first appeal to the Supreme Court of Missouri, there was only one remedy for abandonment by postconviction counsel: appointment of new counsel and additional time to file another amended motion. Resp. Brief 7, 17. But White's authorities for this contention – *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991) (en banc), *Luleff v. State*,

807 S.W.2d 495 (Mo. 1991) (en banc), and *State v. Bradley*, 811 S.W.2d 379 (Mo. 1991) (per curiam) – do not mandate a single abandonment remedy. *Sanders* itself ordered the very remedy White received: treatment of an untimely postconviction motion as timely. Pet. 22. Two years before deciding White's case, moreover, the Supreme Court of Missouri rejected and called "odd" the abandonment remedy White later sought. *State v. Ervin*, 835 S.W.2d 905, 928 (Mo. 1992) (en banc). In a case factually indistinguishable from White's and on the very day the Supreme Court of Missouri promulgated the abandonment doctrine, that Court ratified the remedy White received. *Pollard v. State*, 807 S.W.2d 498, 502 (Mo. 1991) (en banc). White addresses neither *Pollard* nor *Ervin*.

White's reliance on *Bradley* is misplaced. *Bradley* involved postconviction counsel who never filed an amended motion during the eleven months between the filing of the initial *pro se* motion and the trial court's summary dismissal of the case. *Id.* at 384. The record was "utterly silent as to any action taken by appointed counsel after such counsel [was] afforded an opportunity to amend the motion." *Id.* at 383.[3] In short, there was a complete absence of performance by postconviction counsel, that is, *Luleff*, not *Sanders*, abandonment. So the appropriate remedy, and the remedy discussed in the pass[illegible] White quotes, Resp. Brief 7 n.2, was appointment of new

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[3]In *Bradley*, on the s[illegible]day that the defendant filed his *pro se* postconviction motion, postc[illegible]ction counsel filed one, too. It did not purport to be an amended motion and, as the Supreme Court of Missouri held, "[o]n its face" the motion was "clearly a nullity," because it was both unsigned and unverified. *Id.* at 382. The verification requirement was a jurisdictional prerequisite. *Id.* at 383. *Bradley* exposes as false the dilemma the Eighth Circuit thought White faced – "to lose all of his claims in an untimely motion or to sign an improper verification and hope that the motion would at least be timely." App. 117. Had White declined to execute the false verification and had postconviction counsel submitted an unverified motion, White would have gotten the *Bradley* remedy, the remedy he sought.

counsel and additional time to file a new motion. To accept White's reading of *Bradley*, that the Court there announced a single remedy for abandonment, would mean that the Supreme Court of Missouri had *sub silentio* reversed *Sanders* (while citing *Sanders*) and *Pollard*, a case it had decided only two months before. As interpreted by White, *Bradley* is inconsistent with *Ervin*, which preceded White's first appeal to the Supreme Court of Missouri and which rejected the remedy White sought. The Eighth Circuit's holding that the abandonment remedy afforded White was unpredictable and thus an inadequate bar to habeas review rested on a glaring misreading of Missouri law; this Court should correct it. *Cf. Bradshaw v. Richey*, 126 S.Ct. 602, 603-05 (2005) (reversing Sixth Circuit because of its misinterpretation of Ohio's doctrine of transferred intent).

5. In an attempt to moot the adequacy issue, White denigrates Missouri's fact pleading rule, Resp. Brief 8 n.3, the violation of which resulted in White's procedural default of his claims that counsel was ineffective for not calling to the stand various witnesses. App. 242-43. Missouri has had a fact-pleading rule since 1849. *ITT Commercial Fin. Co. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 377 (Mo. 1993) (en banc). That rule is regularly followed and has especial force in postconviction proceedings. *See Morrow v. State*, 21 S.W.3d 819, 822 (Mo. 2000) (en banc); App. 150-51. It is not a "strict wording requirement." Resp. Brief 8 n.3. The problem with White's motion was not that he used the word "adduce," instead of some other word, to describe the witnesses's testimony. Resp. Brief 8 n.3. The problem was that he never said what these witnesses would have testified to. App. 242 ("White's pleadings stop short of directly alleging what the witnesses would testify to, if called. As such, they are deficient[.]"). Missouri has long required such specification. *See, e.g., State v. Starks*, 856 S.W.2d 334, 336 (Mo. 1993) (en banc). Missouri's fact-pleading is an easy-to-satisfy requirement that, as the Supreme Court of Missouri held, prevents Rule 29.15

movants like White from turning the "pleadings process into clever gamesmanship." App. 243.

6. White claims that by the time his case came before the Supreme Court of Missouri, "abandonment by postconviction counsel was a well-settled excuse for procedural default." Resp. Brief 18 n.6. But *Luleff* held that the appropriate forum for rasing an abandonment claim "is in the [trial] court where the motion is being prosecuted by the movant." 807 S.W.2d at 497. And because neither *Luleff* nor *Sanders* expressly made the abandonment doctrine retroactive, White should have anticipated that it would apply prospectively only, and thus not to his case. Pet. 20. In sum: White had no legitimate expectation that he could avail himself of the abandonment doctrine; the Supreme Court of Missouri conferred a windfall on him; and the Eighth Circuit should have turned a deaf ear to his complaint about the adequacy of that windfall. Pet. 19-21.

CONCLUSION

This Court should grant the petition for a writ of certiorari and reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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